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84-1258
No.

IN THE

Supreme Court of The United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

APPENDIX TO THE PETITION FOR CERTIORARI

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APPENDIX A
102 Wash. 2d 874

[No. 49868-7. En Banc. November 6, 1984.]

CHEMICAL BANK,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1, ET AL.,

Respondents.

Utter and Dolliver, JJ., and Alexander, J. Pro Tem., dissent by separate opinion; Andersen, J., did not participate in the disposition of this case.

NATURE OF ACTION: The trustee for the bondholders of two terminated nuclear power plant construction projects sought a declaratory judgment obligating participants in the projects to make their share of the principal and interest payments on the bonds to the Washington Public Power Supply System. The Supreme Court at 99 Wn.2d 772 reversed a partial summary judgment in favor of the trustee, holding that 28 Washington municipalities and public utility districts, representing 70 percent of the total contractual obligation, lacked statutory authority to enter into the financing agreement.

SUPERIOR COURT: The Superior Court for King County, No. 82-2-06840-3, H. Joseph Coleman, J., on August 11, 1983, granted a summary judgment releasing all contract claims against all 88 participants in the projects.

SUPREME COURT: Holding that certain bondholders were not entitled to intervene, that the 28 Washington municipalities and public utility districts lacked authority to enter into the financing agreement, that the Legislature had not ratified the agreement, that the obligation of the 60 remaining participants was unenforceable, that various equitable remedies were in-

applicable, and that no constitutional violations were proved, the court *denies* intervention by the bondholders and *affirms* the judgment.

Betts, Patterson & Mines, P.S., by *Michael Mines* (*Robert F. Mullen, Ralph L. McAfee, Richard S. Simmons*, and *Cravath, Swaine & Moore*, of counsel), for appellant Chemical Bank.

Culp, Dwyer, Guterson & Grader, by *Richard C. Yarmuth, Michele Coad, Robert 0. Marritz*, and *Earle J. Hereford, Jr.*, for appellant Washington Public Power Supply System.

Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern, by *Albert R. Malanca, Kenneth G. Kieffer*, and *Donald S. Cohen*, for respondent Washington Public Utilities Group.

Helsell, Fetterman, Martin, Todd & Hokanson, by *Richard S. White, David F. Jurca*, and *Linda J. Cochran*, for respondents Columbia Rural Electric Association, Inc., et al.

Stimson Bullitt, John D. Lowery, and *Thomas W. Burt* (of *Riddell, Williams, Bullitt & Walkinshaw*), for 21 respondents.

Jones, Grey & Bayley, P.S., by *Hugo E. Oswald, Jr., Margaret A. Pageier, Richard L. Goldfarb*, and *James A. Miller; George F. Hanigan;* and *James P. McNally* and *McNally & Stewart*, for respondents City of Ellensburg, et al.

Lane, Powell, Moss & Miller, by *John R. Tomlinson, H. Peter Sorg, Jr.*, and *Timothy F. Brown*, for respondents Oregon PUD's.

Hillis, Phillips, Cairncross, Clark & Martin, P.S., and *Jerome L. Hillis, Michael F. Schumacher*, and *Gregory E. Keller*, for 9 respondents.

Dwight A. Halstead and *Halstead & Ingvalson*, for respondent Benton Rural Electric Association.

Brown, Thayer & Drummond, by *Robert M. Brown*, for respondent Inland Power and Light Co.

Thoreson, Berry, Yost & Matthews and *Ernest C. Matthews IV* (*Robert H. Jaffe* and *Jaffe & Schlesinger*, of counsel), for intervenors.

John R. Allison, Sharon S. Armstrong, and *Alan P. Sherbrooke* on behalf of the City of Seattle, amici curiae.

Michael D. McKay and *Charles Webb III* on behalf of National WPPSS 4 and 5 Bondholders Committee, amici curiae.

ROSELLINI, J.—

This case first came before our court in *Chemical Bank v. WPPSS,* 99 Wn.2d 772, 666 P.2d 329 (1983) (*Chemical Bank* I) for resolution of the issue of whether 28 municipalities and public utility districts (PUD's) had statutory authority to enter into agreements to build Washington nuclear plants (WNP) 4 and 5. We held that no statutory authority, express or implied, existed and remanded the case for action in accordance with the opinion.

The trial court entered summary judgment in favor of all 88 participants (respondents) in WNP 4 and WNP 5. On appeal, appellants Washington Public Power Supply System (WPPSS) and the bondholders' trustee, Chemical Bank, raise multiple challenges to the trial judge's order of summary judgment.

Appellants also seek review of our decision in *Chemical Bank* I under the terms of Rules of Appellate Procedure 2.5(c)(2).

This factual and legal background, discussed in *Chemical Bank* I, is exceedingly complex. The primary legal issues discussed at length in this opinion can be summarized as follows:

Procedural Questions

1. Should this court reconsider its decision in *Chemical Bank* I?

2. Did the trial judge's order granting summary judgment in favor of all defendants exceed the proper scope of the declaratory judgment action initiated by Chemical Bank?

3. Are any bondholders entitled to intervene in this action at this stage in the proceeding?

Contractual Obligation

4. Do the Washington municipalities and PUDs have statutory authority, either express or implied, to enter into contracts which impose the risk of dry holes on their ratepayers?

5. If the Washington municipalities and PUDs did not initially have statutory authority to enter into these contracts, did the Legislature subsequently ratify the agreements?

6. Did the trial judge err in holding that, because the contracts were unenforceable as to the Washington municipalities and PUDs, they were also unenforceable as to the remaining defendants under any of these three theories: (a) indivisibility of contract? (b) mutual mistake? (c) commercial frustration and impracticability?

Availability of Equitable Remedies

7. If the participants are not contractually obligated to the bondholders, are they nonetheless estopped from denying the obligation under either common law notions of estoppel or article 8 of the Uniform Commercial Code?

8. If the contracts are invalid, are the bondholders nonetheless entitled to restitution from the participants?

Constitutional Claims

9. Did the release of the participants' contractual obligation violate the bondholders' constitutional rights?

Our resolution of this case is as follows:

I

Procedural Preliminaries

For the reasons discussed below, we believe reconsideration of our decision in *Chemical Bank* I is appropriate. We find

the summary judgment order did not exceed the scope of the declaratory judgment action and conclude the bondholders' motion to intervene should be denied.

II

Contractual Obligations

We herein affirm our decision in *Chemical Bank* I and reject appellants arguments that the Legislature ratified the ultra vires contracts. We also affirm the trial judge's release of the 60 remaining participants' obligation on the grounds of commercial frustration and mutual mistake.

III

Equitable Obligations

Our review of the historical origins of equitable estoppel convinces us that the doctrine should not be applied to the facts of this case. We find that the statutory equivalent of equitable estoppel under the Uniform Commercial Code, RCW 62A.8-202, is inapplicable.

IV

Constitutional Claims

We find no violation of appellants' state or federal constitutional rights.

STATEMENT OF THE CASE

Procedurally, this case comes before the court following the trial judge's decision to grant summary judgment in favor of all defendants/participants in WNP 4 and WNP 5. *Chemical Bank* I contains an extensive factual recitation. In addition, the following information pertains to the present action.

WPPSS is a joint operating agency and municipal corporation composed of 19 Washington public utility districts

(PUDs) and four cities. It was formed in 1957 under the provisions of RCW 43.52.360. That statute allows cities or public utility districts and combinations thereof to form an operating agency "for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities . . . for the generation and/or transmission of electric energy and power." The statute further provides that after such an agency is formed, any other city or PUD may become a member upon application and affirmative vote of a majority of its members. A member may withdraw provided "[t]hat all contractual obligations incurred while a member shall remain in full force and effect." The agency may be dissolved upon the unanimous agreement of its members and "the members, after making provisions for the payment of all debts and obligations, shall thereupon hold the assets thereof as tenants in common."

In the early 1970s, WPPSS started construction of three nuclear power plants, WNP 1, WNP 2, and WNP 3. The projects were developed in conjunction with the Bonneville Power Administration. Although those plants also ran into financial trouble, it is the fate of two subsequent plants, WNP 4 and WNP 5, which concerns us here. Plans for these plants were developed when the 88 participants, respondents, joined with WPPSS and Pacific Power & Light Company (WNP 5 only) to obtain financing.[1] Each participant signed an identical 63-page participants' agreement (PA) dated July 14, 1976.

WPPSS then adopted a bond resolution which provided for the construction of both plants and the issuance of revenue bonds. As many of the parties' claims stem from interpretation of the PA, a detailed analysis of this document is necessary.[2]

As noted in *Chemical Bank* I, the PA provided that each participant purchase a "share of the Project Capability" and "a

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[1] Respondents include 9 Washington cities; 7 Oregon cities; 5 Idaho cities; 19 Washington PUD's; 1 Washington irrigation district; 43 rural electric cooperatives; and 4 Oregon PUD's.

[2] All page references are to the bound volume submitted as appendix to this appeal.

right to purchase a share of the capability of any other generating plants undertaken by [the] Supply System . . ." PA, at 2. Project capability was defined as

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

In addition, the participants' agreement gave each participant certain rights, both individually and through representatives on a participants' committee. As appellants claim the participants' committee granted significant control to the participants, a detailed analysis of its function is appropriate.

The committee was to be composed of not less than two nor more than seven members and participants were entitled to designate which representative would vote their shares. PA § 15(a). The participants' committee was required to meet at least quarterly during the construction of the projects. PA § 15(b). Committee meetings could be called any time, however, if representatives with 20 percent of the participant shares so requested. Casting individual votes for each participant's share they represented, committee members were *required* to vote the shares in the manner requested by the participants they represented. PA § 15(b), at 40.

The participants' agreement also detailed procedures for the transfer of information from WPPSS to the committee members and interested participants. The participants' agreement stated that the WPPSS was to provide the committee and any participants who so requested with the following information:

> Determination of Minimum Capability.
>
> Construction budgets and changes therein (Section 8(a)).

Award of any contract or approval of any change order, in either case in excess of $2,000,000, or such other contracts as determined by the Participants' Committee.

Budgets of annual costs and revisions thereof (Section 8(b)).

Fuel Plan, changes therein, and determinations relating thereto (Section 9).

Operating schedules (Section 10).

Insurance coverage, including limits and choice of insurers (Section 11).

Estimates of costs of repair of damage to a Project if in excess of $5,000,000, recommendation whether to repair in whole or in part or to remove from service and construction budget for repair of Project.

Sales of salvage materials in excess of such minimum amount as is established by the Participants' Committee.

Change of an architect-engineer.

Proposed Bond Resolutions.

Any proposal made by Participants' Committee members representing Participants' Shares voting rights of 20% or more.

Construction or acquisition of Nuclear Project No. 5 pursuant to Section 22(b) of the Ownership Agreement.

Repair of Nuclear Project No. 5 pursuant to Section 16(b) of the Ownership Agreement.

Increase in the Supply System's ownership interest in Nuclear Project No. 5 pursuant to Section 20 of the Ownership Agreement.

PA § 15(c), at 41-42.

Members of the participants' committee, representing 20 percent or more of the shares, could disapprove of any action by WPPSS in the above areas and could force the matter to be

reviewed by a project consultant.[3] Using this power, the record indicates that the participants' committee disapproved the 1983 annual budget and disapproved of a contract settlement because the allocation of damages between WNP 3 and WNP 5 was "inequitable."

Finally, the participants were granted certain rights in the completed plants. They were given a share of project capability, and the right to have the plants' output adjusted to meet their needs. PA § 9. If the projects were terminated, the projects' assets were credited to the participants' accounts. PA § 13. Pursuant to this agreement, WPPSS issued $ 2.25 billion worth of bonds in 14 series. When the projects ran into massive cost overruns, WPPSS decided to terminate the plants prior to completion. Many of the participants then repudiated their obligations.

Chemical Bank, the trustee for the bondholders, filed a declaratory judgment action in King County Superior Court in May 1982, seeking a legal determination that the participants were contractually bound to make payments to WPPSS pursuant to the participants' agreement payment schedule.

In late 1982, the trial judge granted Chemical Bank's motion for summary judgment. He held that the participants were required to fund their respective shares of the debt service on the bonds, even if the projects were never completed. He also ruled that the participants were required to fund the costs of decommissioning the terminated projects. He further found that the Supply System and the Washington participants had statutory authority to enter into the participants' agreements. The trial judge concluded that the municipal participants' obligations were not violative of Washington's constitutional limit on incurring debt, and were not an unlawful delegation of power or authority. This court granted discretionary review and rejected the trial judge's conclusion that the Washington municipalities had authority to enter into these contracts.

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[3] If a matter went before a project consultant, his task was to determine whether WPPSS's actions conformed with prudent utility practice. PA § 16.

The case was returned to the trial court for action in accordance with the opinion. Several defendants moved for summary judgment based on this court's mandate. The judge ordered summary judgment in favor of all the defendants. The order provided, in part:

> 1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires,* void *ab initio,* invalid, ineffective and unenforceable;
>
> 2. Inasmuch as the Participants' Agreement is *ultra vires,* void *ab initio,* invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

Order and Judgment, August 11, 1983, at 2-3.

The court then rejected all objections and contentions raised in opposition to this motion by Chemical Bank and WPPSS, concluding that

> none of the moving defendants or any other participant defendant is obligated . . . to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS . . .

Order and Judgment, August 11, 1983, at 3.

This court granted review to resolve the issues set out above.

I

Procedural Preliminaries

A. Reconsideration of Chemical Bank I

The issue of statutory authority was addressed in *Chemical Bank* I. Nonetheless, appellants seek review of that decision under the provisions of RAP 2.5(c)(2).

Appellants urge that reconsideration is appropriate because of the importance of the issues raised by the case, and because reconsideration is authorized by the Rules of Appellate Procedure (RAP).

RAP 2.5(c)(2) states:

> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

A comment to this rule notes that application of this section is mandatory when justice would be best served by a reexamination of the law at the time of the later review. The comment states prior law, referring to the predecessor rule as discretionary, is superseded.

We conclude the complexity of the statutory authority issue and the importance of this litigation to thousands of individuals require a balance between principles of finality embodied in the Rules of Appellate Procedure and the interests of those involved. Moreover, we note consideration of issues raised for the first time in this second appeal by necessity involve discussion of the issues decided in *Chemical Bank* I. We will therefore first reevaluate our decision in *Chemical Bank* I and then turn to those issues new to this appeal. Before doing so, however, two other procedural matters must be addressed.

B. Intervention

The final issue arises from a motion by six bondholders to intervene in this action. Intervenors base their motion on the provisions of CR 24 and RCW 7.24.010.

By court rule, intervention should be permitted, *upon timely application,*

> (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

CR24(a), in pertinent part.

RCW 7.24.110 states the specific rule governing declaratory judgments. It provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In *Williams v. Poulsbo Rural Tel. Ass'n,* 87 Wn.2d 636, 555 P.2d 1173 (1976), this statute was characterized as jurisdictional. The court held that failure to include an affected party, *i.e.,* an essential party, required remand of the case. *Williams,* at 643. This is the relief sought by bondholders.

The motion requests "that this Court remand this action back to the trial court for further proceedings to give an opportunity for all holders and former holders of the Bonds to join this action as party plaintiffs." The proposed intervenors suggest that in such further proceedings they will be in a position to litigate claims which Chemical Bank has made, but for various reasons may be precluded from pursuing, either in

state court or in federal court, or both. The complaint in intervention would also add claims not previously made in this litigation, and would bring in new defendants. The complaint states, for example, negligence and malpractice claims against engineers and attorneys.

Relying on *Martin v. Pickering,* 85 Wn.2d 241, 533 P.2d 380 (1975), the various responses to the motion note that it is not timely.

We note, however, the declaratory judgment statute does not have a timely exception. Also, in *Williams,* this court's characterization of the failure to join interested parties in a declaratory judgment action as a jurisdictional defect suggests no timely element is necessary. On the other hand, CR 24 clearly requires timely application, even when a statute confers an unconditional right to intervene. This leaves an apparent conflict between the way the statute has been interpreted and the court rule.

When statutory provisions and rules of court adopted by the Supreme Court conflict, the court rule governs. *Emwright v. King Cy.,* 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Here, however, the conflict is not so much between the statute and the court rule as it is between our interpretation of the statute and our court rule. We believe this conflict must be resolved in favor of requiring timely application, even when intervention is a matter of right granted by statute.

First, efficient management of litigation can be achieved only by timely application.[4] Here, for instance, the bondholders' motion to intervene would require reevaluation of matters already argued by the parties and determined by the trial court. This would in turn require duplication of work by attorneys and the judicial system at a staggering cost to all.

Second, principles of finality weigh in favor of requiring timely application. Where, as here, thousands of potential

[4] To the extent that the language in *Williams v. Poulsbo Rural Tel. Ass'n, supra,* suggests the opposite result, it is overruled.

intervenors/plaintiffs exist, the defendants to the action cannot be expected to defend each action brought by bondholders dissatisfied with the initial result.

Our conclusion that timely application is required disposes of the bondholders' motion, which was not filed until this action reached the late stages of the appellate process.

We turn now to the subsidiary question of whether the bondholders are bound by the results of this litigation. The trial judge's order released all claims, including the bondholders', raised against the participants. The declaratory judgment statute, however, states that an interested party who is not joined cannot be prejudiced by the results of the declaration. Since the bondholders are certainly parties who have an interest in the litigation, we must decide whether this section of the statute will be interpreted literally. If so, that portion of the order pertaining to the bondholders must be struck.

We believe that this result would be improper, where, as here, the interested parties have a *designated representative.* The bond resolution stated that the bond trustee, *i.e.,* Chemical Bank, was to represent all bondholders.[5] Chemical Bank has

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[5] The bond resolution provided, inter alia:

"Section 11.4. Suits by Bond Fund Trustee; Direction of Action by Bondholders; Possession of Projects; Receivership; Relinquishment of Control. If an Event of Default shall happen and shall not have been waived or remedied, then and in every such case the Bond Fund Trustee, either in its own name or as trustee of an express trust, or as attorney in fact for the holders of all the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, by its agents and attorneys, shall be entitled and empowered to proceed forthwith to institute such suits, actions and proceedings at law or in equity for the collection of all sums due in connection with the Bonds and to protect and enforce its rights and the rights of the holders of the Bonds under the Resolution for the specific performance of any covenant herein contained, or in aid of the execution of any power herein granted, or for an accounting against the System as trustee of an express trust, or in the enforcement of any other legal or equitable right as the Bond Fund Trustee, being advised by counsel, shall deem most effectual to enforce any of its rights or the rights of the holders of the Bonds, or to perform any of its duties under the Resolution. The

served in this capacity for the entire history of this action, and vigorously pressed the bondholders' claims. Under these circumstances, the bondholders must abide by the results obtained by their designated representative. Finally, the claims intervenors raise pertain to the securities' action that is now being tried in federal court. For relief on those claims, the intervenors should seek relief in that forum. As to the contract actions, we hold that the designated representative has fulfilled the representative function contemplated by the intervenor statutes. The motion to intervene is therefore denied.

C. Scope of Judgment

Appellants contend the summary judgment order entered by the court in this case exceeded the scope of their declaratory judgment action. Chemical Bank's complaint sought

> a determination that the Supply System was obligated to make payments to the bond holders and that the Participants were obligated to make payments to the Supply System under the terms of the Participants' Agreement.

Oral Decision, August 17, 1983.

Bond Fund Trustee shall be entitled and empowered, either in its own name or as a trustee of an express trust, or as an attorney in fact for the holders of the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, to file such proof of debt, amendment of proof of debt, claim, petition or other document as may be necessary or advisable in order to have the claims of the Bond Fund Trustee and of the holders of the Bonds and of the coupons appurtenant thereto allowed in any equity, receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceedings relative to the System. For this purpose the Bond Fund Trustee is hereby irrevocably appointed the true and lawful attorney in fact of the respective holders of the Bonds and of the coupons appurtenant thereto (and the successive holders of the Bonds and of the coupons appurtenant thereto by taking and holding the same shall be conclusively deemed to have so appointed the Bond Fund Trustee) with authority to make and file in the respective names of the holders of the Bonds and of the coupons appurtenant thereto any such proof of debt, amendment of proof of debt, claim, petition or other document in any such proceedings, and to receive payment of any sums becoming distributable on account thereof, and to execute any such other papers and documents . . ."

Chemical Bank now asserts that its original pleadings sought only a judicial determination of the relationship between the parties, rather than an affirmative claim of relief. This argument is without merit. First, this theory ignores Chemical Bank's own expansion of the scope of the first action. In that action, Chemical Bank moved for summary judgment on a variety of issues. When summary judgment was granted in its favor on these issues, Chemical Bank did not allege that the order exceeded the proper scope of the pleadings.

Moreover, by expanding proceedings with their original summary judgment motion, Chemical Bank invited a determination of the parties' entire legal obligations. Chemical Bank cannot now complain that the determination against them was improper.

II

Contractual Obligations

A. Statutory Authority

As noted above, appellants first substantive challenge is to this court's prior conclusion that the Washington municipalities and PUDs did not have statutory authority to enter into these agreements. Before addressing their specific arguments, a brief statutory review is in order.

This statutory authority issue involves 28 participants: 19 PUDs and 9 Washington cities of various classes. One category of relevant statutes grants these 28 participants authority to purchase electricity. PUDs are granted with authority under the terms of RCW 54.16.040, which provides:

> A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for

> the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof. . . .

Each class of municipal participant has similar grants of authority to purchase electricity. *See, e.g.,* RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); RCW 35A.80.010.

The statutory provisions creating WPPSS grant an additional layer of statutory authority to purchase electricity. Those statutes allow creation of a joint operating agency which "shall have authority" (1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes (RCW 43.52.300(1)); (2) to construct, condemn, purchase, lease, acquire, operate, develop and regulate facilities for the generation of electric energy (RCW 43.52.300(2)); (3) to enter into contracts for sale, exchange, transmission or use of electric energy (RCW 43.52.300(3), (4)); and (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to so do (RCW 43.52.300(7)). These statutes are to be liberally construed to effectuate their purposes. RCW 43.52.910.

A second category of statutes grants cities and PUDs authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44. RCW 54.44.020 states that the utility or city "shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and

construction thereof and shall own and control a like percentage of the electrical output thereof." RCW 54.44.030 limits a participant's liability to its own acts and forbids the participant from assuming any of the other participants' debt or obligation.

Cities and PUDs may also construct energy facilities on their own. RCW 35.92.050 authorizes a city or town to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity. PUDs have similar authority to construct generating facilities under RCW 54.16.040.

After reviewing the participants' agreement in relation to those statutes, we concluded in *Chemical Bank* I that

> this agreement does not satisfy the statutory scheme governing the public participants. (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retained no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy."

Chemical Bank I, at 798-99.

Appellants attack this conclusion, arguing that the court did not address important facts which established control and, alternatively, that the issue of ownership control is a factual one which requires a full hearing on the merits.

Appellants first argue that all participants had statutory authority. As the critical issue to establish statutory authority is

control over the project, appellants cite several of the provisions of the participants' agreement to support their theory that the participants exercised control sufficient to establish statutory authority over the projects. We recognize that the agreement did supply some control but still disagree with appellants' position that it was control sufficient to protect the interests of their ratepayers as contemplated by these statutes.

Our conclusion is based upon the reasons set out in *Chemical Bank* I. Also, additional evidence of the limited control exercised by respondents can be gleaned from comparing the more complete indicia of ownership and, therefore, control present in the agreement between Pacific Power & Light Company (Pacific Power) and WPPSS. Pacific Power, as a 10 percent owner of WNP 5, was, by virtue of its ownership agreement, given significant rights over and above those granted to the participants. For instance, while the participants usually had to request information, WPPSS was obligated to keep Pacific Power informed on all significant matters, to confer with it prior to developing proposals and to furnish "any and all other information relating to the planning, construction, operation or maintenance of the Project." Pacific Power & WPPSS Ownership Agreement § 3(a).

Moreover, where the participants' agreement gave respondents rights to affect proposed WPPSS actions, any proposal submitted by WPPSS to Pacific Power had to include itemized cost estimates and all supporting reports and analyses. § 3(c). Rather than a 15-day take-it-or-leave-it provision applicable to the participants, Pacific Power was given 30 days to approve proposals, and certain matters could not proceed without Pacific Power's approval. § 3(d). These included changes in any of the following: site, type of steam supply system, architect-engineer or construction manager. § 3(e). Disputes between WPPSS and Pacific Power were to be resolved in the same manner as those between WPPSS and the participants. § 4(e). The ownership contract, unlike the PA, also specifically required WPPSS to award contracts in a cost effective fashion. Finally, Pacific Power's approval was re-

quired on any contract in excess of $500,000. § 7(e). The participants' approval, on the other hand, was required only on those contracts in excess of $2 million.

In summary, the Pacific Power and WPPSS ownership agreement gave greater control to Pacific Power than that granted to the participants. Our reevaluation of the statutory authority question thus leads us once again to the conclusion that the participants' agreement did not grant ownership control as contemplated by this statutory scheme. No statutory authority, therefore, existed.

Moreover, we reject appellants' assertion that the question of ownership control is essentially a factual inquiry. The participants' agreement and Pacific Power's ownership agreement create the contractual rights of the parties. Interpretation of those agreements is a question of law. *Kelly v. Aetna Cas. & Sur. Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983).

Appellants next contend that the agreements were a valid exercise of authority under the joint operating statutes. They offer three arguments. They assert, first, that recent amendments to the statutes demonstrate legislative recognition of the municipalities' authority, citing RCW 43.52.410, which states that no city or district may enter into a contract "to purchase or participate in a portion of an electrical generating project." Appellants conclude that this amendment is a legislative recognition and therefore ratification of these debts. Next, appellants cite an amendment to RCW 43.52.550 which now provides for a repayment provision for contracts such as these. Third, appellants urge that the narrow construction the court placed on the joint operating statutes defeats their purpose.

Respondents note that appellants' arguments ignore RCW 54.44 which provides specific mechanisms for constructing nuclear plants. As discussed in detail in *Chemical Bank* I, we agree. In addition, we find appellants' attempts to find authority in the above-cited amendments to be, at best, a strained interpretation of those statutes. Nothing in the legislative history cited by appellants or the statutes themselves specifically authorizes these contracts. At most, the amend-

ments represent a legislative attempt to provide orderly repayment *if* the utilities are found to be liable for the debts. That conclusion does not logically include the proposition that the debts themselves were valid.

Appellants next contend the court erred in concluding that these contracts were not contracts to purchase electricity. Citing cases from two other states, they urge that these statutes, providing for purchase of electricity, are to be construed broadly. This issue was adequately addressed in *Chemical Bank* I and will not be repeated here. Similarly, arguments pertaining to legislative interpretation and implied powers were raised previously. Appellants offer no compelling reasons to alter our decision on these points.

Finally, it has been argued that the court in *Chemical Bank* I ignored the broad general powers granted to cities under article 11, section 11 of our state constitution. This argument is not persuasive. First, the argument has no application to two-thirds of the participants governed by our original decision. Those participants are public utility districts and consequently do not come within the terms of Const. art. 11, § 11. Second, the argument improperly suggests that the general powers of a city may be exercised in derogation of specific statutory schemes.

Article 11, section 11 itself contemplates this limitation in that it allows cities to make only such regulations "as are not in conflict with general laws." Here, the Legislature developed extensive legislation governing the authority of cities and public utility districts to enter into contracts for the purchase of electricity and the ownership of generating plants. As discussed in *Chemical Bank* I, those statutes contained safeguards to protect ratepayers which were ignored. Those safeguards cannot now be subverted by misplaced reliance on general constitutional provisions.

In summary, we find that appellants' "new" arguments for statutory authority are unpersuasive. Our prior decision is therefore affirmed.

B. Ratification

Appellants' argument that the Legislature subsequently ratified these agreements is equally without merit. As a general rule, ratification requires that the act to be ratified be specifically acknowledged by the ratifying legislation. *See generally* E. McQuillin, *Municipal Corporations* § 29.10 (3d ed. 1981).

The amendments cited by appellants contain no such acknowledgment. Moreover, we cannot adopt appellants' suggestion that the amendments *infer* ratification. Ratification by inference is an ambiguous rule and dangerous doctrine requiring that a court second guess the Legislature. This we decline to do.

C. Contractual Obligation of Remaining Respondents

Appellants' next challenge is to the trial judge's order granting summary judgment in favor of those utilities whose contractual obligations were not before the court in *Chemical Bank* I.

Out of the total of 88 participants, 28 are governed by the statutory scheme described above. Since we had concluded that these utilities were not acting within the scope of their authority, the trial judge on remand was faced with the question of what effect release of the municipalities and PUDs had on the obligation of the remaining utilities. On respondents' motion for summary judgment, the judge ruled that the doctrines of failure of condition, precedent, commercial frustration or impossibility and mutual mistake all applied. These doctrines, the judge concluded, released the remaining participants' contractual obligations.

Appellants challenge this order, arguing that the trial judge's decision ignores the plain language of the contract and the applicable law. We agree that the trial judge incorrectly relied on the condition precedent analysis, but find that the doctrines of mutual mistake and commercial frustration both support his conclusion that the remaining participants were not obligated under the contract.

1. *Failure of Condition.* The Restatement (Second) of Contracts § 224 (1981) defines a condition as an event not certain to occur which must occur before performance under a contract becomes due. An event may become a condition by agreement or may be a term supplied by the court. § 226. The trial judge ruled that section 3 of the participants' agreement created a condition precedent to the formation of the contract. That section states that

> This Agreement shall be effective upon execution and delivery of Participants' Agreements by Supply System and Participants whose Participants' Preliminary Shares total 1.0 [100%] or more.

PA § 3. From this, the trial judge reasoned that the 100 percent (or substantially that) of the participants were required to have authority to enter into the contracts before a duty to perform could be imposed on any participant. We disagree. Section 3 does not establish authority to enter into the contract as a condition precedent to the obligation of all. Section 3 states simply that the contract takes effect when the participants' agreements are executed. Authority to enter into the contract is not mentioned in this section and was thus not made a condition precedent to the participants' obligation.

Furthermore, respondents' attempt to establish statutory authority as a condition of the contract conflicts with the accepted definition of the word "condition". The question of authority does not involve an event not certain to occur but rather a status of certain parties at the time they entered into the contract. For this reason, and that above, we conclude the trial judge erred in viewing section 3 of the participants' agreement as a condition.

2. *Commercial Frustration—Impossibility.* Respondents assert that section 3 of the participants' agreement contemplates 100 percent participation as a material part of the contract. They urge that this court's decision to excuse 28 participants, whose obligation was 70 percent of the total power shares,

should result in the contractual release of the remaining participants under the doctrine of commercial frustration or impossibility. We agree.

Both the Restatement (Second) of Contracts and our case law recognize commercial frustration and impossibility as independent legal theories that may, on occasion, excuse a party's contractual obligations. Recently, this court recognized and applied commercial frustration. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wn.2d 558, 562, 637 P.2d 647 (1981).

> The doctrine of commercial frustration may be summarized as follows:
>
> > Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promissor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.
>
> Restatement of Contracts § 288, at 426-27 (1932). *See also* 18 S. Williston, *Contracts* § 1954 (3d ed. 1978); 6 A. Corbin, *Contracts* §§ 1355, 1356 (1962).

To finance, build or terminate these plants, the municipality and PUD participants were vital. Their share of the projects represents approximately 70 percent of the total obligation. Our decision in *Chemical Bank* I excused these obligations. As the remaining participants did not in any way contribute to this frustration of purpose, we believe contractual release of their obligation is required.

3. *Mutual Mistake.* The trial judge also held that the participants could be excused because all parties were mistaken about the authority of the municipalities. This court applied the doctrine of mutual mistake in *Simonson v. Fendell*, 101 Wn.2d

88, 91, 675 P.2d 1218 (1984). The court described the doctrine's requirements:

> A party seeking to rescind an agreement on the basis of mutual mistake must show by clear, cogent and convincing evidence that the mistake was independently made by both parties. *Beaver v. Estate of Harris,* 67 Wn.2d 621, 409 P.2d 143 (1965); *Carson v. Isabel Apartments, Inc.,* 20 Wn. App. 293, 296, 579 P.2d 1027 (1978). A mistake is a belief not in accord with the facts. Restatement (Second) of Contracts § 151 (1981).

Restatement (Second) of Contracts § 152 (1981) notes that a contract is voidable for mutual mistake when

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
>
> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

We find that the assumption that the municipalities and PUDs had statutory authority was a mistaken assumption material to the contract. As discussed later in this opinion, all parties assumed that statutory authority existed. Moreover, the 60 respondents involved in this issue did not assume the risk that no authority existed. If anyone assumed the risk under the terms of section 154,[6] the bondholders did so. They were in a

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[6] "A party bears the risk of a mistake when

"(a) the risk is allocated to him by agreement of the parties, or

"(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

"(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154 (1981).

position to obtain judicial determination of the authority question, and did not seek such resolution. We conclude release of the 60 respondents is therefore warranted.

III

Availability of Equitable Remedies

Before discussing the equitable obligations of the parties, however, we believe this remedy, as well as the other equitable claims against the *Chemical Bank* I respondents, must be placed in historical perspective.

A. Equity's History

Both sides to this dispute seek the equitable result, but what is equity? One commentator notes that the term is used in two distinct senses. In the first, the word implies right, justice or moral quality. D. Dobbs, *Remedies* § 2.1, at 24 (1973). In another related judicial sense, the word refers to "what was once an entirely separate body of judicial rules, procedures, remedies, and to the separate courts that administered this juridical mass." D. Dobbs, at 24.

B. Types of Equitable Remedies

1. *Estoppel.* Estoppel existed at common law as the principle that a person who asserted a state of affairs should not be allowed to deny the existence of that state thereafter. Equity extended this doctrine. J. Lewis, *Outlines of Equity* 100 (1968). The extension was adopted by the common law; and, by the 19th century both English law and equity held that there would be estoppel where:

(a) there had been a representation by words or conduct,

(b) of existing fact, as opposed to law, which was

(c) intended to be acted upon, and

(d) was acted upon to his detriment by the person to whom it was made.

J. Lewis, at 100.

English legal history recognized two distinct forms of estoppel: promissory estoppel and estoppel by acquiescence. Promissory estoppel in England has been described as follows:

> Where by words or conduct a party to a transaction makes an assurance to the other which—
>
> (a) is intended to affect the legal relationship existing between them; and
>
> (b) is acted upon by the other party who thus alters his position to his detriment;
>
> the first party will not be allowed to behave in a manner inconsistent with his assurance. Having given his promise he is estopped from denying its validity.

J. Lewis, at 101.

A second type of estoppel found in English cases, estoppel by acquiescence, may arise "where a person incurs expenditure, or otherwise prejudices himself, in the belief, actively or passively encouraged by the other, that he had or would obtain a sufficient interest in the property to justify such expenditure." J. Lewis, at 102. This form of estoppel can be used not only as a defense but also as a right of action. J. Lewis, at 102.

Estoppel in American case law is well established but unevenly analyzed. It appears that several forms of estoppel exist. Like its English counterpart, estoppel in American case law has been sometimes limited to defensive use and sometimes used affirmatively.

First, American courts, including Washington's, recognize promissory estoppel. It is defined in Restatement (Second) of Contracts § 90(1) (1981):

> (1) A promise which the promissor should reasonably expect to induce action or forebearance on the part of the

> promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Unlike its British equivalent, however, the Restatement does not limit promissory estoppel to use as defense. Nor has Washington's case law done so. *See Klinke v. Famous Recipe Fried Chicken, Inc.,* 94 Wn.2d 255, 616 P.2d 644 (1980).

Second, Washington courts discuss equitable estoppel.[7] In *Klinke,* this court described both promissory estoppel and equitable estoppel:

> Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise. Equitable estoppel also is available only as a "shield" or defense, while promissory estoppel can be used as a "sword" in a cause of action for damages. Promissory estoppel based on Restatement of Contracts § 90 (1932) has long been recognized in this state and may serve as the basis for an action for damages.

(Footnotes and citations omitted.) *Klinke,* at 258-59. Professor Dobbs, in *Remedies* 2.3 (1973), agrees equitable estoppel may be used only as a defense. He notes "estoppel is, according to the usual statement, a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped party." D. Dobbs, at 42.

Not all Washington cases have strictly adhered to this rule. For instance, in *Beggs v. Pasco,* 93 Wn.2d 682, 611 P.2d 1252 (1980), this court acknowledged that the doctrine of estoppel

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[7] Appellants, who rely on this theory, view equitable estoppel as containing three elements: (1) an admission, statement or act inconsistent with the claim thereafter asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from admission. *Beggs v. Pasco,* 93 Wn.2d 682, 611 P.2d 1252 (1980). Brief of appellant WPPSS, at 57-58. As discussed above, however, we find the concept more complicated than as represented by appellants.

applied to municipalities and then applied it in what appears to be an affirmative manner.[8] Moreover, many cases mingle promissory estoppel with equitable estoppel. *See State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947).

Third, a specialized form of estoppel arises in a series of bond cases decided by our court and the United States Supreme Court at the end of the last century. This form of estoppel, which for clarity's sake we will term estoppel by recital, prohibits a municipality from denying the validity of its bonds under specific circumstances. As these cases are factually similar to the one at hand, a closer look at this form of estoppel is warranted.

One of the early estoppel by recital cases is *Coloma v. Eaves*, 92 U.S. 484, 23 L. Ed. 579 (1875). In *Eaves*, the Court affirmed judgment for a plaintiff who purchased bonds from a municipal corporation. The bonds stated that they had been issued under and by virtue of the law of the state and in accordance with a vote of the electors of the township. In finding for the plaintiff, the Court noted that a bona fide purchaser was not obligated to look beyond such recitals. The Court quoted, with approval, the following rule from *St. Joseph Township v. Rogers*, 83 U.S. (16 Wall.) 644, 21 L. Ed. 328 (1872):

> "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were

[8] A close examination of *Beggs v. Pasco, supra*, however, reveals that the court's conclusion that the city was estopped from denying statutory retirement benefits to the plaintiffs came *after* the court concluded that the unchallenged findings of fact placed plaintiffs squarely within the terms of the statute. *Beggs*, at 688. Consequently, the affirmative relief provided by the court was based upon the statute, not the doctrine of estoppel.

> incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, *if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled.*"

(Italics ours.) *Eaves,* at 492. In subsequent cases, the Court reaffirmed this rule, applying it even when the bonds were issued in excess of a municipality's constitutional debt limit. *See Gunnison Cy. Comm'rs v. Rollins,* 173 U.S. 255, 43 L. Ed. 689, 19 S. Ct. 390 (1898). *Accord, Cuddy v. Sturtevant,* 111 Wash. 304, 190 P. 909 (1920).

In explaining its rationale, the Court in *Gunnison* noted that the rule depended on who makes the recitals and whether their position justifies the public's reliance. The Court noted:

> If the officers authorized to issue bonds, upon a condition, are not the appointed tribunals to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. *The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.*"

(Italics ours.) *Gunnison,* at 267 (quoting *Dixon Cy. v. Field,* 111 U.S. 83, 28 L. Ed. 360, 4 S. Ct. 315 (1884)).

In addition to promissory estoppel, equitable estoppel and estoppel by recital, our case law has applied the concept to foreclose denial of certain facts or representations. To prevent injustice then, the court has evoked estoppel in pais, estoppel by misrepresentation, and laches. (*See generally Arnold v. Melani,* 75 Wn.2d 143, 147, 437 P.2d 908 (1968) and cases cited therein.) The multiplicity of these terms has obscured rather

than clarified the law, however, and is of dubious applicability to this case. We prefer, therefore, to confine our discussion to the three forms of estoppel clearly recognized by the courts and the Restatements as separate doctrines and to the theory of unjust enrichment discussed below.

2. *Unjust Enrichment.* Just as the term "estoppel" has been used widely to describe a variety of legal actions, the term "unjust enrichment" is equally amorphous.

John Dawson notes that, in the English common law, relief for unjust enrichment can be found under many different names, including remedies for disseisin of land, the quid pro quo requirement in an action for debt and remedies in equity for enforcing trust or canceling transfers for fraud and duress. J. Dawson, *Unjust Enrichment* 9 (1951). Relief for unjust enrichment is frequently called restitution. Restitution will be granted in a variety of circumstances, including those involving contractual relief for mutual mistake or commercial frustration. *See* Restatement (Second) of Contracts § 272 (1981), *Simonson v. Fendell,* 101 Wn.2d 88, 675 P.2d 1218 (1984).

We turn now to the application of general principles of equity to the specific facts of this case.

C. Application of Doctrines

1. *Equitable Estoppel.* As previously suggested, appellants contend that the general principle of equitable estoppel applies to their case because the participants made representations which were relied upon by the bondholders and resulted in injury. We need not decide whether equitable estoppel may properly be used in an affirmative manner, as we conclude the doctrine is inapplicable. First, although equitable estoppel is sometimes applied to municipal corporations, such application is not favored. *PUD 1 v. Cooper,* 69 Wn.2d 909, 918, 421 P.2d 1002 (1966). This disfavor has led courts to conclude that to establish equitable estoppel, every particular must be proven by the plaintiff with clear, cogent and convincing evidence. *PUD 1 v. Cooper, supra.* We believe that plaintiffs have not met this burden.

We find the doctrine is inapplicable because the representations relied upon by the bondholders were representations as to questions of law, not questions of fact. As such, the bondholders should have resorted to a declaratory judgment action to determine the issue of authority. Further, even if the representations are factual, the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of those facts. Consequently, we have observed:

> In order to create an estoppel it is necessary that:
>
> "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, *but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.*" 11 Am. & Eng. Ency. Law (2d ed.), p. 434.

(Italics ours.) *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969) (*quoting Wechner v. Dorchester*, 83 Wash. 118, 145 P. 197 (1915)).

As suggested earlier in the opinion, the question of statutory authority could and should have been resolved in a declaratory judgment action. As this was not done, the parties cannot now complain of the consequences of their neglect in the matter. For the same reason, we find that the participants are not estopped by their recitals in the bonds.

2. *Estoppel by Recital.* Estoppel by recital, (discussed above) leads us to the conclusion that the doctrine is a limited concept applied in very narrow circumstances. There are three requirements for the doctrine's application. First, the municipality must have authority to enter into the transaction. *See South Ottawa v. Perkins*, 94 U.S. 260, 24 L. Ed. 154 (1876). Second, if the plaintiff seeks to establish estoppel based on recitals in a bond, the individual or entity making such recitals

must be both authorized to make those recitals, and one on whom the public should be entitled to rely for the truth of the representation. *Gunnison Cy. Comm'rs v. Rollins, supra.* Third, the recital, as in the equitable estoppel cases, must be one concerning facts rather than law. Appellants' case meets only one of these three requirements. Although the municipalities did have general authority to enter into the transactions, we find that the participants are not the final authority on the question of statutory interpretation created by these contracts, and that the representation was legal rather than factual. Those issues in this case are factual and are properly the jurisdiction of a court of law. We conclude that the doctrine of estoppel by recital, as developed in the last century, should not be applied here.

3. *Statutory Estoppel—RCW 62A.8.* Both appellants offer the provisions of article 8 of the Uniform Commercial Code in support of their theory that our statutes prohibit participants from denying payment on these obligations. The trial judge rejected this argument because he believed it was precluded by *Chemical Bank* I. This conclusion is not required by our decision. Thus, a detailed analysis of the issue is in order.

This argument arises from the court's repeated reference to the municipal participants as guarantors. In *Chemical Bank* I, the court repeatedly stated that the agreement was essentially an unconditional guaranty of payment. *Chemical Bank* I, at 784, 786, 798. RCW 62A.8-201(2) provides that a "guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security." The conclusion that a guarantor is an issuer is important because it triggers the provisions of RCW 62A.8-202. That section provides:

> (1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and those made part of the security by reference to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like to the extent that the terms so referred to do not conflict with the stated terms. Such a reference does not of itself charge a

purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.

(2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.

(b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

RCW 62A.8-202(1), (2). Comment 6 to the rule states that the rule is based on the estoppel by recital cases discussed above. The Washington comment to this section states that the statute has substituted two criteria for the recital requirement. First, there must be substantial compliance with the statute's governing issue. Second, the municipality must have received substantial consideration and the stated purpose must be within the power of the issuer. *See* Comment, RCWA 62A.8-202.

Respondents assert that this statute is inapplicable. They first argue that the participants are not issuers. Several theories are offered to support this proposition, none of which we find persuasive. They allege, for instance, that the participants are not guarantors because the only basis for finding a guarantor relationship is the participants' agreement which this court has already ruled invalid. Respondents' arguments are circular and not supported by authority.

Respondents' next argument for evading the terms of RCW 62A.8-202(2)(b) is that no securities have been challenged, because everyone admits the validity of the bonds. Respondents have repudiated only the participants' agreement, and this agreement has already been determined not to be a security by the trial judge. Because this conclusion was not challenged on appeal, respondents assert that it is now the law of the case. This argument is appealingly simple. It ignores, however, the history of this case which, originally, came to this court on discretionary review of an interlocutory order. As such, appellants were not obligated to appeal every adverse decision against them. Furthermore, this court narrowly tailored the issues on review in *Chemical Bank* I. Thus, it would be unjust to preclude the argument on procedural grounds. Respondents' argument is therefore rejected.

Nonetheless, we agree that the PA does not fall within the terms of RCW 62A.8-202. We conclude the PA does not meet the statute's definition of a security. RCW 62A.8-102 defines the word security very narrowly. It states:

> (1) In this Article unless the context otherwise requires
>
> (a) A "security" is an instrument which
>
> (i) is issued in bearer or registered form; *and*
>
> (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; *and*
>
> (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; *and*
>
> (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(Italics ours.)

The participants' agreements are not issued to a bearer, they are not registered or commonly dealt in as a medium for investment, and are not one of a class. In fact, of the above requirements, only (iv) applies to the participants' agreement. Appellants argue, nonetheless, that the participants' agreement was an integral component of the bonds and therefore should be considered as falling within the parameters of this statute. Appellants cite no case authority[9] for this proposition and offer no compelling policy reasons for extending the definition of security to this agreement.

We conclude that the participants' aqreement does not meet this definition. RCW 62A.8-202 is therefore inapplicable.

D. Unjust Enrichment

As noted above, a party must make restitution when he has been unjustly enriched at the expense of another. Restatement of Restitution § 1 (1937). The Restatement (Second) of Restitution § 1 (Tent. Draft No. 1, 1983) contains a slightly different formulation of this general principle. It states:

> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Each of these statements, however, involves the transfer of benefit from one party to another. It does not require, as respondents infer, that the benefit still exist. As noted in comment *b* to the Restatement of Restitution § 1 (1937),

> [a] person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to

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[9] Appellants cite RCW 62A.8-201(2) to support their allegation that the participants' agreement is part of the security. That section states:

> (2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security.

This section does not address, however, a situation where, as here, the invalidity is in the separate agreement rather than the security. We decline, therefore, to read this section as suggested by appellants.

> or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Restatement, at 12.

The definition of benefit is critical to appellants' argument because respondents allege that the bondholders did not confer a benefit on the participants. This argument and the related question of whether justice requires restitution in this case will be addressed later in the opinion. We turn first, however, to an argument which pertains only to those respondents whose contractual obligations were held to be ultra vires by our decision in *Chemical Bank* I.

Respondents, citing 10 E. McQuillin, *Municipal Corporations* § 29.04 (1981) and *Finch v. Matthews,* 74 Wn.2d 161, 443 P.2d 833 (1968), contend that the unjust enrichment theory cannot be applied against a municipality where the acts are substantively ultra vires. We agree and, for the reasons set out below, find the acts substantively ultra vires.

A substantive/procedural dichotomy appears in virtually every ultra vires case.[10] The general rule, stated most recently in *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982), states that a private party, acting in good faith, may recover from a governmental agency if the agency "had the power it sought to exercise but merely . . . exercised it in an irregular manner or by unauthorized procedural means", and the action was not malum in se, malum prohibitum or manifestly against public

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[10]As noted throughout this opinion, courts often grant relief against a municipality under the various equitable theories discussed above. Each equitable doctrine seems to adopt this procedural versus substantive dichotomy, however. Thus, though the discussion of the distinction is contained in this section of the opinion, the conclusion that the acts were only procedurally ultra vires applies to the other theories herein discussed.

policy. *Noel,* at 381. Not surprisingly, both sides assert that this rule supports their position. Appellants argue that the municipalities had broad general statutory authority to enter into contracts for purchase of electricity and generating plants. They conclude that the only error was a procedural one, that is, the contracts did not clearly set out a sufficient ownership interest to protect ratepayers. Respondents counter with the allegation that *Chemical Bank* I already decides the issue of whether the contracts were procedurally or substantively ultra vires.

We believe the instance case falls within this rule. As we concluded in *Chemical Bank* I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." *Chemical Bank* I, at 799. If the contracts had been for these purposes, the participants would have had statutory authority. They were not. The doctrine of substantively ultra vires activity thus precludes recovery.

As noted above, a Restatement's definition of benefit is quite broad. Thus, our task here is to determine whether any asserted benefits fall within this definition. We conclude they do not.

We find persuasive respondents' theory that the benefits of the bond revenues flowed to WPPSS and no further. WPPSS contracted with the bondholders, received their money and appropriated it for its purposes. We can see no benefit to the participants in these circumstances.

In summary, we find no benefit passed to the respondents and, thus, justice does not require restitution. Moreover, restitution against those respondents released by our decision in *Chemical Bank* I is precluded because their activities were substantively ultra vires.

IV

Constitutional Claims

Appellants assert that the United States Constitution and the Washington State Constitution would be violated if they are denied relief. Appellants do not rely directly on any one

provision of the constitutions but instead extract general principles from cases under the contract clause, U.S. Const. art. 1, § 10, cl. 1; the takings clause, U.S. Const. amend. 14, § 1; and the due process clause, U.S. Const. amend. 14, § 1. Appellants' arguments depend upon reading the various clauses together. No case has done so. Moreover, authority cited in appellants' briefs do not support their theory. For instance, *Kaiser Aetna v. United States,* 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) involved a simple application of the takings clause to action by the Federal government. Petitioner, Kaiser Aetna, leased and improved a private tidal pond which had no access to the ocean. After petitioner dredged the pond, created ocean access and a marina, the Federal government sought to enforce a public right of access to the pond. The Supreme Court held that this could not be done without compensation to petitioner. *Kaiser* thus supports only the proposition that the government may not take private property without compensation. Here, no taking occurred.

Likewise, the State has not impaired a contract obligation. When a city acts beyond its specific statutory authority, no contract obligation is created. The contract is void. *Chemical Bank* I.

Appellants' due process argument is equally unpersuasive. No cases have held that a court's ruling, as a matter of law, that a contract is unenforceable, violates due process. In summary, the rule suggested by appellants would effectively vitiate a court's ability to invalidate contracts. This we decline to do.

We find that the bondholders' interests have been adequately represented in this case. Their motion to intervene is denied. We reject appellants' attacks on our decision in *Chemical Bank* I and their equitable arguments. The trial judge's decision is affirmed.

WILLIAMS, C.J. and BRACHTENBACH, DORE, DIMMICK and PEARSON, J.J., concur.

UTTER, J. (dissenting)—I dissent from the majority's conclusion that this court should not review its holding reached in *Chemical Bank v. WPPSS* 99 Wn.2d 772, 663 P.2d 329 (1983). The provisions of RAP 2.5(c)(2) clearly authorize reconsideration.

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

The history of this rule indicates it was adopted by this court for precisely the situation we now face, a situation where adherence to the earlier ruling as the rule of the case would be both unwise and a perpetuation of earlier error. As of the date of this opinion, at least four scholarly publications have reviewed the court's initial opinion and all four are critical of its conclusion and the reasoning used to justify it. Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown,* 5 J. Energy *L. & Poly* 273 (1984); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine,* 8 U. Puget Sound L. Rev. 59 (1984); Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes,* 59 Wash. L. Rev. 653 (1984); Note, *Chemical Bank v. Washington Public Power Supply System: The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations,* 69 Cornell L. Rev. 1094 (1984). Events occurring since publication of our first opinion make clear it will in no way spare the people of this state continuing costs of litigation and exposure to liability. On October 15, 1984, investors who bought bonds for WNP 4 and WNP 5 filed a claim for $7.25 billion against the State of Washington. The entire population of the state is now potentially liable, including those areas that specifically rejected participation.

The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event

they do, the United States Supreme Court should exercise its discretion and accept this case for review. Our court's action is similar to that taken by many state courts in the Reconstruction era which were reversed on constitutional grounds by the United States Supreme Court.

In *Gelpcke v. Dubuque,* 68 U.S. (1 Wall.) 175, 17 L. Ed. 520 (1863), the Supreme Court rejected the Iowa Supreme Court's refusal to enforce railroad bonds.

> [I]f the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

Gelpcke, at 206. Many subsequent decisions during the Reconstruction era went even farther. *See generally* C. Fairman, *History of the Supreme Court of the United States,* 918-1116 (1971).

The Supreme Court continues to invoke the takings clause and the contracts clause to protect citizens from the transfer of private property to public purposes by governmental action. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983). In this century, most takings and contracts clause cases respond to legislative, not judicial action. Nonetheless the United States Supreme Court continues to recognize that state courts may not "redefine" as private what had been vested public rights. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164 (restraining Florida Supreme Court from "transform[ing] private property into public property without compensation").

I

I disagree with the majority on a number of grounds in its ruling that the Washington public utility districts (PUD's) and Washington municipal participants lacked authority to enter into their respective agreements. Although it is difficult for this

court to admit it was in error in the largest case to come before this court in its history, we should do so now. By so doing we would let the normal legal processes resolve this dispute on the facts and the law which should be applied.

A

The majority opinion throws into confusion a body of municipal law carefully developed over many years prior to this case which granted to municipalities broad authority in the exercise of their police powers. This power to manage their own affairs, subject to broad legislative guidance, has been carefully built into our constitution, statutes and case law. Our own recent cases, not mentioned by either majority opinion, confirm this. *Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980) and *United States v. North Bonneville*, 94 Wn.2d 827, 621 P.2d 127 (1980).

Prior to *Chemical Bank* I, this court liberally construed powers given to first class and code cities. *Winkenwerder v. Yakima*, 52 Wn.2d 617, 622, 328 P.2d 873, 878 (1958). RCW 35.20.900. In determining whether municipalities were given certain powers to act, we have liberally applied the "reasonable necessity test" where police power actions are involved. *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978); *Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 817, 539 P.2d 845, 849 (1975).

By finding no express authority to enter into the participants' agreement in *Chemical Bank* I, this court did not comment on several earlier accepted rulings. In the majority opinion, first class and code cities were given the same restrictive interpretation of their statutory authority as were other cities. This is contrary to our own consistent line of earlier authority. *Winkenwerder v. Yakima, supra.*

The majority inadequately deals with our previous holdings which have placed actions involving public works within the liberally interpreted police powers of cities, counties and

towns. *Housing Auth. v. Seattle,* 56 Wn.2d 10, 15, 351 P.2d 117, 120 (1960); *Kaul v. Chehalis,* 45 Wn.2d 616, 625, 277 P.2d 352, 357 (1954); and *Morse v. Wise,* 37 Wn.2d 806, 810-11, 226 P.2d 214, 216 (1951).

The court in its majority opinion also erroneously interprets the legislative intent expressed in our statutes that authorize certain municipal corporations to construct, acquire and operate electric generating facilities. RCW 35.92.050 and 54.16.040. These statutes focus on control over the electricity produced, rather than on control over the facilities, as emphasized by the majority.

The legislative declaration requiring broad construction of joint operating agency statutes is ignored by the majority. *See* RCW 43.52.910. Instead, its opinion strictly construes RCW 43.52 to achieve what I believe is a nonexistent distinction between powers of a joint operating agency and powers of its participants. RCW 43.52.910.

I also disagree with that portion of the majority opinion dealing with implied statutory authority. Contrary to our general liberal interpretation of police power statutes, the court relied on taxation, not police power decisions, to hold that the test for implied powers is legal necessity instead of the fairly implied or reasonable necessity test. *See, e.g., Scott Paper Co. v. Anacortes,* 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978). Taxation cases are totally inapplicable inasmuch as they rely on different constitutional provisions than the police power cases. Const. art. 7, §§ 5, 9; art. 11, § 12. In *Hillis Homes, Inc. v. Snohomish Cy.,* 97 Wn.2d 804, 809, 650 P.2d 193, 195 (1982), the court required express statutory authority under the wording of article 11, section 12, a taxation provision. On the other hand, Const. art. 11, § 11 provides:

> Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

This section is effective without legislative enactment and is a more direct grant of authority than that found in the taxation

sections. *Patton v. Bellingham,* 179 Wash. 566, 570, 38 P.2d 364, 365 (1934). This court's earlier attempt to distinguish *Municipality of Metro Seattle v. Seattle,* 57 Wn.2d 446, 460, 357 P.2d 863, 872 (1960) fails, due to its basic error which confuses tax cases with police power cases.

Serious questions remain regarding the impact of our decision, if unchanged, on future Washington law. Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes, supra* at 667-69. Any action not backed by the clearest express authority may well be found to be ultra vires. Legal opinions regarding municipal authority will be difficult to give and municipal projects, without legislative or judicial approval of municipal authority, difficult to market. Municipal corporations are deprived of the opportunity for innovative solutions to their problems in the absence of a clear expression of legislative or judicial approval. The decision provides a fertile ground for judicial challenge to major municipal undertakings and limits the ability of municipal corporations to work between themselves to solve their common problems. Declaratory judgment proceedings will increase, of necessity, adding to overcrowded court dockets, diversion of scarce judicial resources and increased cost to taxpayers of time and money.

Most seriously, municipal corporations will be required to increasingly ask for legislative clarification of their authority. Given the Legislature's limited schedule, significant time lags between identification of problems and legislatively authorized solutions will be commonplace.

B

There are some 28 Washington municipalities and PUD's as participants involved in Washington Public Power Supply System (WPPSS). The question of whether they had statutory authority to enter into their respective agreements was the subject of *Chemical Bank* I. Of these participants, 19 are PUD's and 9 are Washington cities of various classes. PUD's are granted authority to purchase electricity under the terms of

RCW 54.16.040.[1] Each class of municipal participant had similar grants of authority to purchase electricity. *See, e.g.*, RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); and RCW 35A.80.010.

In addition to the previously cited authority, the statutes creating WPPSS add an additional layer of statutory authority to purchase electricity. Creation of a joint operating agency is authorized which "shall have authority" (1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any and all such purposes, RCW 43.52.300(1); (2) to construct, condemn, purchase,

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[1] RCW 54.16.040 provides:

"A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof: *Provided,* That the commission shall not supply water to a privately owned utility for the production of electric energy, but may supply, directly or indirectly, to an instrumentality of the United States government or any publicly or privately owned public utilities which sell electric energy or water to the public, any amount of electric energy or water under its control, and contracts therefor shall extend over such period of years and contain such terms and conditions for the sale thereof as the commission of the district shall elect; such contract shall only be made pursuant to a resolution of the commission authorizing such contract, which resolution shall be introduced at a meeting of the commission at least ten days prior to the date of the adoption of the resolution; *Provided further,* That it shall first make adequate provision for the needs of the district, both actual and prospective."

lease, acquire, operate, develop and regulate facilities for the generation of electric energy, RCW 43.52.300(2); (3) to enter into contracts for sale, exchange, transmission or use of electric energy, RCW 43.52.300(3), (4); (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to do so, RCW 43.52.300(7). The Legislature mandated that these statutes be liberally construed to effectuate their purposes. RCW 43.52.910.

A third category of statutes grants cities and PUD's the authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44.020 requires that the utility or city

> shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof.

That chapter also limits the participant's liability to its own acts and forbids the participant from assuming any of the other participants' debt or obligation. RCW 54.44.030.

A fourth category grants cities and PUD's authority to construct energy facilities on their own. They are authorized by RCW 35.92.050 to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity.

The court's opinion in *Chemical Bank* I reasoned that the participants' agreement with WPPSS failed to satisfy the statutory scheme governing public participants for a number of reasons. The majority held: (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retain no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal

services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy". *Chemical Bank* I, at 798-99.

I have previously stated why, as a matter of law, I believe the majority was incorrect. The majority in *Chemical Bank* I is also in error when it assumes, as a matter of fact, that ownership, or its equivalent in terms of control, did not exist under the facts of this case. At *Chemical Bank* I, pages 787-88, the majority, in referring to the complexity of budgets and construction decisions, states that it was "unlikely that a part-time committee . . . could provide significant input" and asserts that the participants' committee "apparently served as a rubber stamp".

For the majority to resolve these issues as factual conclusions violates Washington Constitution article 4, section 6 which gives to the trial courts the sole authority to decide factual issues.

> Factual disputes are to be resolved by the trial court. . . . The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. If we were so disposed, but we are not, we are not authorized to substitute our judgment for that of the trial court.

Stringfellow v. Stringfellow, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960).

The majority in *Chemical Bank* I, and today, incorrectly relies on *Kelly v. Aetna Cas. & Sur. Co.,* 100 Wn.2d 401, 670 P.2d 267 (1983) to justify this court's authority to resolve issues of ownership control by characterizing them as questions of law rather than fact. The interpretation of the participants' agreement, the majority asserts, is solely a matter of law. Its statement of the law contained in *Kelly* is incomplete, however, for the interpretation or legal effect of a contract is a matter of

law for the court *only* in the absence of disputed facts. *Yeats v. Estate of Yeats,* 90 Wn.2d 201, 580 P.2d 617 (1978); *Epperly v. Seattle,* 65 Wn.2d 777, 399 P.2d 591 (1965). *See generally* 4 S. Williston, *Contracts* § 616 (3d ed. 1961); 3 A. Corbin, *Contracts* § 554, 595 (1960 & Supp. 1984).

In *Kelly,* an insurance law case, the Washington Supreme Court found summary judgment appropriate where a complete factual record had been developed and no dispute other than the legal meaning of a term contained in an insurance policy existed. The court found the interpretation of the term "owner" to be a question of law. The decision in *Kelly* is consistent with the established legal principle that the interpretation of legal meanings of specific terms within insurance contracts is generally a question of law. *See Pacific Indem. Co. v. Bloedel Timberlands Dev., Inc.,* 28 Wn. App. 466, 624 P.2d 734 (1981); *see generally* E. Farnsworth, *Contracts* 515-517 (1982). In *Kelly,* we engaged in no weighing of evidence or trying of facts.

Unlike *Kelly,* the present case presents numerous factual disputes which go well beyond the mere legal definition of terms. Since numerous factual questions relating to the actual operation of the participants' agreement exist, consistency with both Washington contract and constitutional law requires that a full factual record be developed and that all factual disputes be resolved at the trial level.

Even if the majority correctly resolved the issues of ownership and control, however, it did not by so doing answer all of the necessary issues that remained before the court for decision. As a matter of statutory interpretation, not all the statutes pertaining to the PUD's and municipalities require ownership. Some, such as RCW 35.92.050, on their face authorize schemes similar to the participants' agreement. While the first portion of RCW 35.92.050 speaks to ownership interests, the statute also states that a city or town may

> authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity or power from either within or without the city or town for its

> own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

This provision was an integral part of Judge Coleman's decision at the trial level, is not adequately dealt with by the majority, and provides authority for the participants to act.

As another alternative, were this court to find the majority's conclusions in *Chemical Bank* I correct, appellants argue that, on the record, 20 of the participants had control by virtue of their membership in WPPSS. Those 20 participants represent 68 percent of the project's shares and held 88 percent of the voting power on WPPSS. As to these participants, the statutes governing WPPSS grant them both ownership and management control over the projects. *See* RCW 43.52.370 and 43.52.374 (management and control of joint operating agency vested in a board composed of member utilities and outside directors); RCW 43.52.360 (after dissolution, members hold assets as tenants in common). The majority in *Chemical Bank* I also failed to address itself to this argument. Given this degree of control over the projects by the large majority of the participants, this court was in error in concluding as a matter of law, without further factual inquiry, that these participants lacked sufficient control over the projects to protect their ratepayers.

Even if the majority's conclusion that the participants did not have an ownership interest in WNP 4 and WNP 5 was correct, the participants' committee provided the participants with a vehicle to exert their management control. Although I cannot disagree with the majority's determination that "the participants' committee apparently served as a rubber stamp for WPPSS' decisions," *Chemical Bank* I, at 788, courts have consistently recognized in securities litigation that investors who fail to exercise opportunities for control available to them cannot later claim they lacked control. *See, e.g., Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666 (10th Cir. 1972), aff'g 324 F. Supp. 460 (D. Colo. 1970). Absent documentation that their attempts to control debt exposure through the WPPSS participants committee were frustrated, this court and the

federal courts should not permit the participants to argue they had no management control.

For all the above stated reasons, I would affirm the summary judgment granted by the trial court in all respects. Our failure to find authority exists for the participants to enter into the agreements raises serious questions as to the basis upon which Washington nuclear power plants 1, 2 and 3 were built. These plants were built with the same basic agreements as those entered into by the participants WNP 4 and WNP 5, with the added benefit of net billing. If the participants did not have authority to enter into the agreements for plants 4 and 5, they could not now assert the right to participants' shares in a working plant. Such a conclusion could well force the Bonneville Power Authority to seize the participants' interests in plants 1, 2 and 3.

C

By ruling only on the authority issue, the court in *Chemical Bank* I did not address the other issues before the court in that case. The lower court's ruling should be discussed on these matters inasmuch as it was correct in every respect and the factual issues remaining to be resolved should proceed to trial.

The trial court did not abuse its discretion in deciding to strike the jury demand. Its reliance on *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980), was proper. There we noted, "[i]n determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." *Brown*, at 368. The trial judge explicitly applied in his analysis the factors required in the *Brown* case. He first considered that the issues raised were an affirmative defense, but looked beyond the pleadings to the true nature of the allegations and concluded that this was, in fact, an action for rescission.

The court acted within its authority and no showing has been made that there was a reversible abuse of discretion. The record supports its conclusion that the participants' equitable

affirmative defense was to seek rescission of the contract and that this is not a case of a defendant attempting to destroy the right to a jury by asserting equitable defenses; that participants seek both equitable relief and a jury; that the main issues are equitable; that the equitable issues are complex; that only the equitable issues remain to be tried if the other aspects of its ruling are upheld; that the overall nature of the action is not doubtful; and lastly, that the real issues in dispute are equitable.

The trial court also properly determined that the liabilities incurred by the participants did not exceed statutory or constitutional debt limitations. The determinative issue is whether the participants' liabilities are a debt for constitutional debt limitation purposes. This court has defined "debt" in the context of article 8 to mean "borrowed money; it denotes an obligation created by the loan of money, usually evidenced by bonds but possibly created by the issuance of paper bearing a different label." *State ex rel. Wittler v. Yelle,* 65 Wn.2d 660, 668-69, 399 P.2d 319 (1965). We have in the past consistently held that the provisions of article 8, section 6 of the Washington Constitution do not apply under revenue financing conducted through the bases of the "special fund" doctrine. The rationale behind this exemption is that obligations payable not from general tax revenues but from a special fund are not debts of the municipality in a constitutional or statutory sense. *State ex rel. State Fin. Comm. v. Martin,* 62 Wn.2d 645, 661, 384 P.2d 833 (1963). The parties designed this revenue bond program to conform to the requirements of the special fund doctrine. The source of the payments on the bond are either (1) revenues generated from the projects, or (2) revenues pledged by participating public utilities. As such, according to our previous rulings, the participants' obligations do not fall within the constitutional or statutory debt limitations.

Finally, the trial court properly held that the contracts obligate the participants to pay costs of decommissioning in debt service. Decommissioning costs refer to payments to contractors for work done on the projects as well as payments to settle contracts interrupted when the projects were terminated. (Participants' Agreement (PA) § 13(a)(ii), at 36-37).

Debt service refers to the principal and interest payments to the bondholders.

To resolve whether the trial court correctly interpreted the obligation of the participants to pay the costs of decommissioning in debt service requires an examination of the participants' agreement and bond resolution. Interpretation of the agreement is governed by the fact that the projects were terminated pursuant to section 13 of the participants' agreement but that termination occurred prior to the completion of the projects. Project financing was structured so that payment sources depended upon whether the project was under construction, operating or terminated. There are three key definitions involved: "contract year"; "billing statement" and "annual budget".

"Contract year" as defined in the participants' agreement starts on the earliest of three dates: "(i) the earlier of the Dates of Continuous Operation of any of the Plants or (ii) on July 1, 1988, or (iii) the date one year after the date of termination of the Project as provided in Section 13". PA § 1(g), at 7. These trigger dates represent the possible commencement of participant payments. After the contract year begins, the monthly billing statement determines the amount to be paid the supply system by the participant. PA § 1(b), at 4-5. That amount is calculated by multiplying the participant's share by the amount of the annual budget less payments from other sources, and adding the cost of fuel. Finally, annual budget is defined as:

> "Annual Budget" means the budget adopted by Supply System pursuant to Section 8(b) with respect to the Projects and which itemizes the estimated costs of each Project, commencing with (i) the Date of Continuance Operation of the Plant related to such Project, or (ii) July 1, 1988, or (iii) the date one year after the date of termination of a Project as provided in Section 13, whichever is earliest, exclusive of costs of construction as defined in the Bond Resolution, and costs of fuel, applicable to the respective Contract Year . . . The Annual Budget, as amended from time to time, shall make provision for all such Supply System's costs, including accruals and amorti-

> zations, resulting from the ownership, operation and maintenance of the Projects, repairs, renewals, replacements, and additions thereto and costs of termination thereof as provided in Section 13, together with the amounts over or under billed in accordance with subsection (b) below. The Annual Budget shall include, but not be limited to, (i) the amounts which Supply System is required under the Bond Resolution to pay in each Contract Year into the various funds provided for in the Bond Resolution from the Revenue Fund, as therein defined, for debt service and all other purposes . . .

PA § 1(a), at 3-4.

Prior to the three possible trigger dates, which were (1) 1 year after the termination of the project; or (2) July 1, 1988, or (3) the date of continuous operation of a plant, payment of the project's costs were not made by participants. Instead, bond proceeds were used. However, after the so-called trigger dates, participant payments are required to begin through the annual budget.

The trial court correctly determined that under the applicable provisions of the participants' agreement, decommissioning costs are unequivocably included in the annual budget. The projects were correctly terminated pursuant to section 13 of the participants' agreement which requires WPPSS to begin decommissioning the projects and make monthly accounting statements to the participants. The annual budget definition expressly includes "costs of termination thereof as provided in Section 13". PA § 1(a), at 4. The final accounting section 13 requires is a final report to the participants as to any remaining decommissioning costs.

The agreements established successive sources of payments to the bondholders for the costs of debt service. First, when bonds are being sold to finance the projects, Bond Resolution (BR) § 6.8A2, at 42-43, requires WPPSS to pay from bond proceeds into the bond fund amounts necessary to provide for payment of interest on the bonds. These payments are defined as a "cost of construction." BR § 6.9F, at 46. It is apparent

these provisions were drafted to anticipate ongoing construction and bond sales. Inasmuch as these two activities are not indefinite, the parties provide for three "trigger" dates at which time alternative means of funding would be used. Under section 6.2 of the bond resolution, that date is the earliest of: (1) one month from the date of continuous operation (at which time operating revenues, at least in part, would begin to pay for the debt); or (2) July 25, 1988 (the presumed latest date for construction to be completed); or (3) one year after the date of termination. BR § 6.2A(1)-(3), at 29-31. As structured, there were "successive" sources of payment depending upon whether the projects were under construction, operating or terminated. Because the plants were terminated in January of 1982, the third alternative source would apply.

Under this latter provision, WPPSS must pay from the revenue fund to the bond fund "cost[s] of termination", *i.e.*, amounts necessary to satisfy the debt payments. BR § 6.2A(3), at 31. The definition of annual budget in the participants' agreement expressly includes "debt service", PA § 1(a), at 4, which means the participants must pay these amounts.

Respondents make several arguments. Their argument that the documents do not provided for "dry hole" risks is erroneous. The bond resolution provides for payment from "money pledged hereunder" which includes, by necessity, participants' revenues and does not depend on revenues generated by the project or general obligation bonds. Appellants argue that the costs of construction are explicitly exempted from the annual budget, PA § 1(a), at 3, which means that debt service is payable only from amounts properly payable into the revenue fund. The trial court correctly found that BR § 6.2A(3) resolves this problem. Finally, respondents argue they are not obligated to pay for any debt service because the annual budget definition limits debt service to payments from the "revenue fund". PA § 1(a), at 4. Respondents correctly point out that section 6.1 only defines what goes into the revenue fund, but that under section 6.2, WPPSS is required to pay for all unfunded debt service. Participants' pledge revenues must be used to pay those obligations.

For the foregoing reasons, I would affirm the initial ruling of the trial court which leaves for trial the equitable defenses asserted by the respondents. I would also deny bondholders' motion to intervene.

II

While I agree with a major part of the discussion by the majority regarding the history of the development of equitable remedies, it is important to first note that the history of our legal system suggests several general principles which shape the application of equitable relief. First, although lawyers generally speak of law and equity as separate concepts, history belies this characterization. Law and equity had common origins and goals. *See generally* W. de Funiak, *Modern Equity* 6 (2d ed. 1956); F. Maitland, *Equity* 15 (1949). They were brought to England via the Normans, diverged as the need arose to preserve individual jurisdiction and merged again as that need abated. F. Maitland, *supra.* Second, each legal system attempted to do justice within the confines of its procedural limitations and each, at some point, was more rigid in its rules than the other. G. Keeton & L. Sheridan, *Equity* 3 (1969). Third, both legal systems seem to have borrowed from each other during the period in which they had separate identities. Since that time, both systems have adopted concepts wholesale. One rule, common to both, is the proposition that the law will enforce promises.

Washington has consistently recognized equitable principles and enforced promises in specific circumstances. Our courts have stated: Equity will not suffer a wrong to be without a remedy, *Rummens v. Guaranty Trust Co.,* 199 Wash. 337, 346-47, 92 P.2d 228 (1939); equity treats that as done which by agreement is to be done, *Fleishbein v. Thorne,* 193 Wash. 65, 72, 74 P.2d 880 (1937); and he who comes into equity must come with clean hands, *Langley v. Devlin,* 95 Wash. 171, 187, 163 P. 395 (1917). To enforce these maxims, our legal system developed specific rules recognized in Washington law and elsewhere and described in part in the discussion in the majority.

There are two equitable theories which I believe warrant recovery by the appellants. Although the majority correctly concludes that RCW 62A.8-201 is inapplicable, RCW 62A.8 and our history of common law estoppel point to another theory of recovery raised by implication in the briefs of appellants. That theory, recognized long ago in English courts of equity, and now embodied in Restatement (Second) of Contracts § 90 (1981), states that a promise which the promissor should reasonably expect to induce action on the part of the promissee is binding if injustice can be avoided only by enforcement. Like equitable estoppel, our courts have acknowledged that under the right facts, the doctrine may be applied against a municipality. *See State v. Northwest Magnesite Co.,* 28 Wn.2d 1, 26, 182 P.2d 643 (1947). *See also* Annot., *Promissory Estoppel,* 48 A.L.R.2d 1069, 1086 (1956).

Promissory estoppel has four elements: a promise, foreseeability of reliance on that promise, actual reliance, and a finding that the reliance was justified. Comment, *Promissory Estoppel in Washington,* 55 Wash. L. Rev. 795 (1980). We find each element present here.

Appellants have repeatedly alleged, and respondents cannot deny, that they made unequivocal promises to pay these debts. Section 6 of the participants' agreement states in clear, definite language that the participants would make payments under the agreement whether or not any of the projects were completed. Reliance on that promise was not only foreseeable, it was intended. In the bond resolution (approved by the participants), potential bondholders were told that the plants were being developed for the participants, and that the participants pledged their revenues as security for the bonds. Each bond resolution was approved by the participants through their committee. See Bond Resolution, at 9. That there was actual reliance on the participants' promises cannot be doubted. The bondholders' collective purchase of $2.25 billion worth of bonds amply demonstrates that fact.

The final promissory estoppel prerequisite, that the reliance be justifiable, must, when viewed against the parties'

course of conduct for the 5 years prior to termination, be answered in the affirmative. Until the plants were terminated, all concerned assumed that the parties had the requisite statutory authority. The bonds were freely traded and interest payments timely made. Only when the plants were actually terminated did the participants attempt to avoid their promise to the bondholders. And, only with this court's opinion in *Chemical Bank* I, was the issue of statutory authority resolved.

Under these circumstances, I believe the participants' promise must be enforced to the extent that justice requires. My conclusion rests not only on the Restatement § 90 provision but also upon the public policy embodied in RCW 62A.8-201. While I reject the notion that the participants' agreement constitutes a security, I recognize that RCW 62A.8-202 reflects a clear legislative intent that municipalities as well as individuals be held responsible for their promises and actions.

I believe the same general limitations contained in RCW 62A.8 and cases concerning equitable estoppel should be adopted in applying the doctrine of promissory estoppel. Thus, the promise must be within the promisor's general power. See RCW 62A.8-201(2). Such is the case here. In this court's original majority opinion, we acknowledged the participants' general authority to enter into contracts to build nuclear power plants and to take the actions necessary to fund those plants but held that the participants had acted improperly in entering the dry hole contract. *Chemical Bank* I, at 784. Also, we recognize that the statutes contemplate general authority to act in this area. *See* RCW 35.92.050, RCW 43.52.300(1).

The majority concludes that the doctrine of unjust enrichment does not apply because the acts of the appellants were substantively ultra vires. The majority concludes that *Chemical Bank* I has already decided the issue of whether the contracts were procedurally or substantively ultra vires. I cannot agree.

When the term "substantive authority" was used in *Chemical Bank* I, it was not used in the sense of deciding whether it was procedurally or substantively ultra vires because that issue was not before us. In the past, this court has differentiated

between substantive and procedural ultra vires through use of the adjectives primary and secondary. The first classification (substantive or primary) refers to acts a municipality has no authority whatsoever to perform. In the second classification fall those acts which are within the lawful powers of the municipal corporation, but which are void because of an irregularity in the procedure leading up to the act. *Jones v. Centralia,* 157 Wash. 194, 218, 289 P. 3, 11 (1930). Whether these acts were primary or secondary ultra vires should not be decided summarily and requires further discussion.

The classic application of the primary ultra vires doctrine involves the invalidation of actions that directly contravene express constitutional or statutory provisions. The doctrine's harsh results make sense upon examination of the common law basis for the doctrine. Premised on the fundamental difference between the private and public sectors, application of the doctrine exhorts a private contractor to ascertain the authority and limitations of a municipal corporation. *See,* Comment, *An Aberration in Washington's Application of the Ultra Vires Doctrine, supra,* at 60-76.

One of the earliest cases concerning ultra vires is *Osborne, Tremper & Co. v. King Cy.,* 76 Wash. 277, 136 P. 138 (1913). In *Osborne,* the plaintiff sued King County for services performed under a contract with the river and harbor commission. A number of King County residents, operating upon the belief that the United States intended to construct the Lake Washington Ship Canal, petitioned the county commissioners for appointment of the river and harbor commission and it was thereafter appointed. The river and harbor commission then contracted with the plaintiff for preparation of an assessment roll. Payment for these services was to come from the property assessments. A few months later, the county commissioners rescinded the authority of the river and harbor commission. In the plaintiff's action to collect for services, the court denied recovery, noting the general rule

> that where there is a want of power to make a contract or a want of power on the part of the body of officers making the contract to bind the municipality, there can be no

> estoppel against the municipality to defeat payment by reason of accepting the benefit conferred by the contract.

Osborne, at 285-86. The court reasoned that the county commissioners did not have authority to create the assessment district, and therefore did not have authority to incur risks incident to the district's creation.

In *Edwards v. Renton,* 67 Wn.2d 598, 409 P.2d 153 (1965), the court confronted mixed substantive and procedural statutory violations, but approved recovery against the City of Renton. Renton had contracted with plaintiff for the installation of a traffic control signal, but failed to follow bidding procedures. The City neglected to properly budget funds for the installation. The court found that this contract represented a borrowing of funds which the City of Renton had no power to do. The court then went on to discuss the policy reasons for statutory municipal budget requirements and concluded that the contract ran afoul of these policies. Nonetheless, the court allowed a limited recovery where the contract was for a "public improvement furnished to and retained by the municipality [and where it was] within the scope of its authority to provide". *Edwards,* at 604. *Edwards* therefore moved the secondary ultra vires doctrine toward fulfilling the *reasonable* expectations of private parties contracting with public entities, consistent with the decline of the sovereign immunity doctrine. See RCW 4.92.090, 4.96.010.

The *Edwards* rule was further explained in *Finch v. Matthews,* 74 Wn.2d 161, 443 P.2d 833 (1968). *Finch* involved the power of King County to acquire and dispose of property in order to build roads. Although the facts are complicated, it appears that the county exchanged some worthless property for a road right of way. The City of Seattle then sought to annex the property, arguing that the County had no power to dispose of it because the property exchanged was dedicated "'to the use of the public forever'". *Finch,* at 163. The City urged a narrow interpretation of equitable estoppel against a municipality, arguing in essence that the doctrine could be valid "only when the governmental act is strictly within the recognized and

established powers of government." *Finch,* at 169. The court rejected this view of equitable estoppel, holding instead that the distinction was between acts done "*wholly without legal authorization*" or in "*direct violation of existing statutes*" and "*those acts which are within the scope of the broad governmental powers conferred, granted or delegated*". (Italics mine.) *Finch,* at 172.

In *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982), the court most recently affirmed the *Edwards* analysis. In *Noel,* the court concluded that the Department of Natural Resources had authority to sell timber, but not without preparing an environmental impact statement. However, regulations in effect required no EIS be prepared. Finding the sale a procedural violation and because both the DNR and the purchaser had acted in good faith, the court held that recovery for the purchaser was necessary to prevent unjust enrichment. *Noel,* at 381.

I believe the instant case falls within the *Edwards-Noel* rule. The majority concluded in *Chemical Bank* I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." *Chemical Bank* I, at 799. To that end, and to fulfill their statutory duty to develop sufficient energy sources, the participants entered into the agreements and subsequently pledged their revenues. Those acts are within their general powers as contemplated by *Noel, Finch, Edwards* and *Osborne.* Thus, as the action of the state or municipalities in entering into the agreements was only procedurally ultra vires, restitution may be obtained if a benefit was in fact given.

As to the remaining arguments of respondents, the common law doctrines which released their contractual obligations contemplate restitution if one party receives a benefit. For example, Restatement (Second) of Contracts § 272 (1981) states the remedy to be given if frustration occurs:

> (1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 377.

> (2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

Similarly, as noted in *Simonson v. Fendell,* 101 Wn.2d 88, 93, 675 P.2d 1218 (1984), mutual mistake entitles the parties to rescission and return to their original position. As a

> general principle . . . rescission contemplates restoration of the parties to as near their former position as possible or practical. *J.I. Case Credit Corp. v. Stark,* 64 Wn.2d 470, 392 P.2d 215 (1964); *Yount v. Indianola Beach Estates, Inc.,* 63 Wn.2d 519, 387 P.2d 975 (1964).

Here, however, it would be impossible to return the parties to their positions prior to the contract given the lack of statutory authority of those participants released by *Chemical Bank* I. Those participants represent approximately 70 percent of the total monetary obligation. Justice requires some sort of restitution to the bondholders. Because the public utilities and municipalities also have equitable obligations, the remaining discussion concerning remedy, benefit and equitable distribution of loss will apply equally to those released by our original decision, and those released on common law contractual grounds.

As noted above, the Restatement's definition of benefit is quite broad. Thus, the task here is to determine whether any asserted benefits fall within this definition. I conclude they do.

WPPSS asked for and received $2.25 billion in bond revenues on the request of the participants. The participants received exactly what they bargained for through their representatives on WPPSS. As noted in comment *a* to Restatement (Second) of Contracts § 370 (1981), receipt by a party of performance bargained for is regarded as a benefit. I believe the facts of this case amply demonstrate that proposition.

Further, this arrangement by which participants purchased shares of the plants' electrical output in return for their pledge of revenues satisfied the utilities' duty to develop sufficient

energy resources for their ratepayers. The pertinent statutes contemplate that electrical needs of a city or public utility district will be filled. To do this, the participants must spend significant sums of money to develop alternative resources to meet future demands. The City of Seattle, as amicus, observes that it has spent $37 million for various small projects, and will spend $21 million *annually* for settlement of the High Ross Agreements. The total cost of projects now in progress is $164 million. Several of these projects have been terminated and, as a result, the City of Seattle has absorbed the entire loss. Brief of amicus curiae City of Seattle, at 19. Clearly, most of the participants involved in WNP 4 and WNP 5 could not absorb similar development costs. To the extent that the nuclear plant projects relieved the participants of their immediate costs, while allowing them to fulfill their statutory duty, they received benefits from the bondholders.

Finally, it was for the participants' benefit that the plants were being built in the first place. By entering into these agreements, pledging their revenues as security and inducing the bondholders to lend money to WPPSS, the participants anticipated that they would be able to guarantee their consumers electricity at the low rates projected for nuclear power. Without such an arrangement, each utility would have had to either develop other sources of electricity or purchase electricity at whatever would be the then current market price. The bond revenues allowed them to avoid consideration of both of these alternatives.

Moreover, I am not persuaded by respondents theory that the benefits of the bond revenues flowed to WPPSS and no further. As discussed in detail above, WPPSS existed as a joint venture of the member utilities and the participants. Despite the majority's conclusion that the participants lacked the statutorily required ownership interest, I believe that the real interested parties to this transaction were the participants. To them, the benefits flowed and, from them, restitution is therefore proper. These factors lead me to the conclusion that justice requires some relief to the bondholders.

Remedy

The appellants have established two theories of recovery—promissory estoppel and unjust enrichment. Restatement (Second) of Contracts § 90 (1981) states that the remedy for a breach of promissory estoppel may be limited as justice requires. Similarly, the Restatement of Restitution § 1 (Tent. Draft No. 1 1983) provides:

> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Appellants contend that principles of restitution entitle the bondholders to the entire $2.25 billion plus interest. I disagree. This figure would grant the bondholders their expectancy interest on the contracts. The majority has held that those contracts are void, however. Moreover, appellants' suggested remedy ignores the realities of the bond market. Much of the loss suffered by the bondholders is the result of panic-trading, speculation, and other forces that cannot be attributed solely to the participants' breach of promise. For instance, even before the participants disputed their legal obligation, prices quoted in the Wall Street Journal indicated the bonds were trading at levels substantially below par.

Also, appellants' argument for full restitution confuses the amount loaned WPPSS with the amount of benefit received by the participants. Just as the bondholders' investment was diluted by market forces, the participants benefit was diluted by rising interest rates and market forces which made completion of the plants impossible.

Finally, amongst the people who now hold these bonds are numerous individuals who purchased their bonds after this court clearly stated that no statutory authority existed to enter the contracts. Those individuals do not come to equity with "clean hands" and I believe no equitable considerations weigh in favor of granting these individuals a windfall.

Given the complexity of this case and the posture in which it is now before this court, I am unable to discern the proper amount of recovery to the bondholders. I believe that equitable principles, however, require that we recognize the complex forces that led to the bondholders' present loss. Those principles convince me that the proper measure of restitution in this case may not exceed the value of the bonds on the day prior to our decision in *Chemical Bank* I. After that date, investors were clearly on notice that no authority existed. Prior to that date, much of the bondholders' investment was dissipated by forces unrelated to the participants' promises. Moreover, I also believe that individuals purchasing their bonds after that date should be entitled to the purchase price of those bonds and no more. It would be inequitable to allow these individuals to profit from the losses of bona fide bondholders and the participants' ratepayers. Finally, I believe that the participants are entitled either to an offset of any value contained in the plants or to the plants themselves.

This award sets only the maximum amount of recovery I would allow under the legal theories herein discussed. The trial judge could reduce this amount by other equitable considerations and may make such provisions for payment of the judgment as are just and equitable, considering the relative positions of the bondholders and ratepayers.

For the foregoing reasons, I dissent.

DOLLIVER, J. and ALEXANDER, J. Pro Tem., concur with UTTER, J.

APPENDIX B

99 Wash. 2d 772, 666 P.2d. 329
CHEMICAL BANK, a New York
corporation, Respondent,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
a Washington municipal corporation
and joint operating agency, Respondent,

and

Columbia Rural Electric Association, Inc.,
an Oregon corporation, *et al.*, Petitioners.

No. 49186-1.

Supreme Court of Washington,
En Banc.

June 15, 1983.

Reversed.

Dore, J., concurred in result and filed opinion. Utter, J., dissented and filed opionion in which Dolliver, J., concurred.

Helsell, Fetterman, Martin, Todd & Hokanson by Richard S. White, David F. Jurca, and Linda J. Cochran, Seattle, Wash., for petitioner Columbia Rural Elec. Assn.

Stimson Bullitt, Gordon W. Wilcox, and John D. Lowery of Riddell, Williams, Bullitt & Walkinshaw, Seattle, Wash., for 21 petitioners.

Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern by Albert R. Malanca, Kenneth G. Kieffer, Donald S. Cohen, and John C. Guadnola, Tacoma, Wash., for petitioners Washington Public Utilities Group.

Milne, Lemargie & Fitterer by Robert Milne, Ephrata, Wash., Davis, Arneil, Dorsey, Kight & Parlette by David J. Dorsey, Wenatchee, Wash., and Williams, Novack & Hansen by Jeffrey E. Pratt, Everett, Wash., for petitioners PUD's Nos. 1 and 2.

George, Hull & Porter, P.S. by John D. Reagh and Richard A. Pitt, Seattle, Wash., for petitioners Cities of Canby, Cascade Locks, and Drain.

Jones, Grey & Bayley, P.S. by Hugo E. Oswald, Jr., Margaret E. Pageler, and Charles H. Thulin, Seattle Wash., for petitioner City of Ellensburg.

Detels, Draper, Madden & McGee by Martin P. Detels and Bonita L. Olson, Seattle, Wash., Rankin, McMurry, Vav-Rosky & Doherty by Garry P. McMurry, Portland, Or., and Haugeberg & Rueter by David Haugeberg, McMinnville, Or., for petitioners Cities of McMinnville and Springfield.

Smith & Rosellini by Jacob L. Smith, Lynden, Wash., for petitioner City of Sumas.

Lane, Powell, Moss & Miller, John R. Tomlinson, Larry S. Gangnes, and H. Peter Sorg, Jr., Seattle, Wash. (Schwabe, Williamson, Wyatt, Moore & Roberts, Rockne Gill, J. Laurence Cable, Donald A. Haagensen, and Bernard Ryan, Portland, Or., Heisler & Heisler and Stanley D. Heisler, The Dalles, Or., and George P. Winslow, Jr., Tillamook, Or., of counsel), for petitioners Oregon PUD's.

Frome & Goulding and Ted C. Frome, Afton, Wyo., for petitioner Lower Valley Power and Light, Inc.

Velikanje, Moore & Shore, Inc., P.S. by Scott L. Schmidtman, Yakima, Wash., for petitioners Borgens, *et al.*

William H. Rodgers, Jr., Peter J. Eglick, and Michael W. Gendler, Seattle, Wash., for petitioners Clark County PUD Owners' Ass'n, *et al.*

Betts, Patterson & Mines, P.S. by Michael Mines, Seattle, Wash. (Cravath, Swaine & Moore, New York City, of counsel), for respondent Chemical Bank.

Culp, Dwyer, Guterson & Grader, Richard C. Yarmuth, Michele Coad, Earle J. Hereford, Jr., Edwards & Barbieri, and Malcolm L. Edwards, Seattle, Wash., for respondent Washington Public Power Supply System.

Roberts & Shefelman, George M. Mack, and Joni H. Ostergaard, Seattle, Wash. (James M. Taylor, City Atty., Seattle, Wash., of counsel), for respondent City of Richland.

Forrest W. Walls, Douglas H. Rosenberg, and William M. Doyle, Seattle, Wash., on behalf of Washington Public Ports Association, amici curiae for respondents.

BRACHTENBACH, Justice.

The Washington Public Power Supply System (WPPSS) issued revenue bonds to obtain funds to construct two nuclear generating plants known as WNP-4 and WNP-5. Bonds in the face amount of approximately $2.25 billion have been issued; repayment with interest will cost approximately $7.2 billion. Chemical Bank is the trustee for the bondholders.

Construction of the two plants was undertaken. On January 22, 1982 WPPSS terminated construction of both plants. At that time WNP-4 was approximately 24 percent completed and WNP-5 approximately 16 percent completed. Costs to date had almost reached the original estimated total cost for complete construction of both plants. WPPSS alleges that termination was necessary due to its inability to obtain adequate financing to complete the projects.

Chemical Bank brought a declaratory judgment action against WPPSS and the participants (defined hereafter) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, with interest. In general WPPSS has responded to the suit by substantially agreeing with Chemical Bank as to the rights and obligations of the various parties. Most of the participants, however, have interposed numerous defenses to any payment obligation.

The pleadings framed numerous issues, some of which have been determined by the trial court on motions for partial summary judgment. We granted discretionary review on limited issues on which the trial court granted summary judgment in favor of the bond trustee and stayed further trial on other issues until this appeal was decided. On some of those issues we reverse.

To understand the complex issues, a recital of facts is necessary. WPPSS is a "joint operating agency" established in 1957 under RCW 43.52. It is a municipal corporation. RCW 43.52.250. Its members are 19 public utility districts and four cities, Ellensburg, Richland, Seattle and Tacoma. It has authority to acquire, build, operate and own power plants and systems for the generation and transmission of electricity. RCW 43.52.300. WPPSS also has authority to issue revenue bonds payable from the revenues of the utility properties operated by it. RCW 43.52.3411. It may not levy taxes or issue general obligation bonds. RCW 43.52.891.

In the early 1970's WPPSS started construction of three nuclear generating projects, WNP-1, WNP-2 and WNP-3. Those projects were developed in conjunction with a number of participating public utilities from several northwestern states, including Washington. In 1974 WPPSS decided to construct two additional plants, WNP-4 and WNP-5, financing of which is the subject of this litigation. WNP-4 is owned entirely by WPPSS; WNP-5 is owned 90 percent by WPPSS and 10 percent by Public Power & Light Company, a privately owned utility.

Besides WPPSS and Pacific Power & Light Company, there are 88 "Participants" in these two projects: 9 Washington cities, 19 Washington public utility districts, 1 Washington irrigation district, 7 Oregon cities, 4 Oregon peoples utility districts, 5 Idaho cities, and 43 rural electric cooperatives, of which 13 are in Washington. The remainder of the REC's are in Idaho, Montana, Nevada, Oregon and Wyoming. Each of the participants in WNP-4 and WNP-5 signed an identical 63-page "Participants' Agreement", dated July 14, 1976.

A 117-page "Bond Resolution" was adopted by WPPSS on February 23, 1977 providing a plan for the construction of both plants and providing for the issuance of revenue bonds.

Each Participants' Agreement provided that "[s]upply System hereby sells, and the Participant hereby purchases, its Participant's Share of Project Capability."

"Project Capability" is defined in section 1(v) of the agreement as:

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

The Participants' Agreement requires each participant to pay monthly its proportionate share of a "Billing Statement" issued annually by WPPSS and based upon an "Annual Budget." The "Annual Budget" is to be adopted by WPPSS commencing with the "Date of Continuous Operation" (defined in effect as when the plant is ready to be operated and the output scheduled on a commercial basis) OR the date 1 year after the termination of a project. The Bond Resolution in turn similarly requires WPPSS to collect and set aside funds sufficient to make payments on the bonds. Termination thus established a trigger date for various payments, and gave rise to this lawsuit.

The Participants' Agreement purports to require payment to WPPSS whether or not the projects are ever completed, operable or operating. Specifically, section 6(d) provides:

> The Participant shall make the payments to be made to Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

The Bond Resolution requires WPPSS to collect charges for electricity and capability, which are adequate to provide for payment of the revenue bonds "whether or not the generation or transmission of power . . . is suspended, interrupted or reduced by any reason whatever . . ."

Thus, if the agreements are valid, and subject to interpreting the contract, the participants collectively could pay approximately $7 billion for nuclear plants which will never generate any electricity. Ultimately the ratepaying consumers of the participants would pay for the nonexistent electricity.

The method of financing WNP-1, 2 and 3 differs from the involved in WNP-4 and 5. The Bonneville Power Administration, a federal agency, facilitated financing of the first three plants through complex "net-billing" agreements that allocated the risk of noncompletion to the federal agency. *Springfield v. Washington Pub. Power Supply Sys.*, 564 F. Supp. 90 at 95 (D. Or. 1983). Since Judge Redden concluded that net billing only requires the participants to pay for power as it is provided, *Springfield*, at 12, those projects apparently may be characterized as contracts for the purpose of power. We need not analyze this device, but note that it resulted in an indirect guaranty by Bonneville Power Administration, combined the costs of nuclear power plant construction with less costly hydropower and resulted in lower interest rates on the bonds.

The rates charged by WPPSS or public utility districts are not subject to the ratemaking supervision of the State Utilities and Transportation Commission. RCW 43.52.450; RCW 54.16.040.

As noted above, various participants interposed numerous defenses to the Chemical Bank action and cross claims against WPPSS. Among those defenses were (1) allegations that at least some participants did not have authority to enter into the agreement; and (2) that proper interpretation of the agreement did not require payment as sought by WPPSS and the bond trustee. Demand for a jury was made.

After hearing extensive oral argument and considering voluminous briefs and affidavits (the record is nearly 7,000

pages) the trial court entered an order on summary judgment motions on November 16, 1982 which provided *inter alia:*

> 1. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of the debt service which WPPSS is obligated to pay on the bonds issued pursuant to WPPSS Board of Directors Resolution No. 890 (the 'Bond Resolution') and the resolution supplemental thereto. Such debt service on the bonds includes all principal and interest when due, whether or not any of the projects (WPPSS Nuclear Plants Nos. 4 and 5) has been or ever will be completed or placed into operation.
>
> 2. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of decommissioning costs incurred by WPPSS, whether or not any of the projects has been or ever will be completed or placed into operation. Under the terms of the Participants' Agreement, such decommissioning costs (a) are not limited to costs incurred after termination of the projects and (b) are to be included in the Annual Budgets to be paid by the Participants pursuant to the annual or amended Billing Statements.
>
> 3. As a matter of law, WPPSS had statutory authority to enter into the Participants' Agreement and Bond Resolution and to issue the bonds pursuant thereto.
>
> 4. As a matter of law, the Washington participants (other than Vera) had statutory authority to enter into the Participants' Agreement. All Oregon authority issues have been stayed pursuant to an earlier order of this court, and this order has no bearing on the authority of Oregon participants to enter into the Participants' Agreement. The court reserves decision as to whether Vera and the other participants had authority to enter into the Participants' Agreement and will give further consideration to that issue at a later date.

5. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the incurring of debt. Such obligations do not constitute debt within the meaning of such limitations, and even if such limitations were otherwise applicable they would be rendered inapplicable by reason of the special fund doctrine under Washington law.

6. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the lending of credit.

7. As a matter of law, the Participants' Agreement does not constitute or provide for any unlawful delegations of power or authority by Washington participants.

8. The Interstate Compact Clause of the United States Constitution is not applicable to the Participants' Agreement.

* * * * *

10. The aforesaid crossmotion for summary judgment or partial summary judgment filed by Ellensburg, Springfield and McMinnville, the 'Columbia defendants' and the '22 defendants' are denied.

Clerk's Papers, at 120-22.

Later the court struck the jury demand. We granted review of the authority and interpretation issues as well as the striking of the jury.[1]

We are asked to decide whether the Participants' Agreement and the Bond Resolution, hereinafter referred to as the agreement, were contracts within the statutory authority of the

[1]This opinion is limited to the statutory authority questions and we do not address the other issues presented by the parties: the right to a jury; WPPSS' authority; municipal debt limitations; or contract interpretation.

Washington participants.[2] While the participants are not direct parties to the Bond Resolution, the Participants' Agreement, § 25, provides that WPPSS must comply with the Bond Resolution and the Participants' Agreement is subject to the terms of the Bond Resolution.

Initially, some principles of statutory construction are relevant to the court's analysis. "Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purpose of the statute." *Nationwide Papers, Inc. v. Northwest Egg Sales, Inc.*, 69 Wash.2d 72, 76, 416 P.2d 687 (1966). Similarly, "[s]tatutes pertaining to the same subject matter must be harmonized, if possible." *Snohomish Cy. PUD 1 v. Broadview Television Co.*, 91 Wash.2d 3, 8, 586 P.2d 851 (1978). The resolution of the authority issue requires an examination of the entire statutory scheme governing each category of participant to determine whether they had the express power to enter into this agreement. Absent express statutory authorization, we must also consider whether participation in the agreement may be based upon necessary or implied powers. Aided by applicable rules of statutory construction and prior cases construing the various statutory powers, we ultimately must decide whether the present agreement conforms to the statutes. Our conclusion in this case is therefore based upon an examination of all Washington statutes authorizing the purchase of electricity, the

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[2] This issue is limited to the authority of the Washington PUD's and municipalities, hereinafter referred to collectively as the participants. The authority of most of the rural electrical cooperatives (including those in Washington) and the Vera Irrigation District were the subject of separate trial court orders and are not before this court. The authority of the Idaho, Oregon, Wyoming and Nevada participants is currently being litigated in their respective states.

An Oregon trial court has held that Oregon cities and PUD's lacked authority and the agreement was contrary to public policy. Defazio v. Springfield Utility Board, cause 16-81-11344 (Lane County Cir. Ct. Nov. 5, 1982). That case is on appeal. The Idaho Supreme Court has entered an order prohibiting collection of funds until the matter is decided on the merits. Asson v. City of Burley, cause 82-174 (Sup. Ct. Nov. 3, 1982). The Wyoming Rate Commission has ruled that rates may not be increased to pay the WPPSS debt.

acquisition or construction of generating facilities, joint operating agencies, and joint development of energy generating projects.

I. PURCHASE OF ELECTRICITY

The Washington participants have explicit statutory authority to buy electricity on behalf of citizens. For example, each of the 19 Washington Public Utility Districts (PUD's) involved in this litigation is authorized to: "purchase, within or without its limits, electric current for sale and distribution within or without its limits . . ." RCW 54.16.040.

Similarly, the nine Washington municipal participants could purchase electricity, although the grants of authority varied according to the class of city or town. The first class cities of Tacoma and Richland were authorized to: "provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights . . ." RCW 35.22.280(15). Centralia, the only participant exercising second class city powers,[3] had the authority to: "provide for lighting the streets and all public places of the city and for furnishing the inhabitants of the city with gas, electric, or other light . . ." RCW 35.23.440(44). As third class cities, Blaine and Ellensburg had the power to: "establish, lay out, alter, keep open, open, widen, vacate, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city, and to drain, sprinkle and light the same . . ." RCW 35.24.290(3). In practically identical language, towns such as McCleary and Steilacoom were authorized to secure electricity. RCW 35.27.370(4). The final category of municipal participants, code cities, includes Port Angeles and Sumas. A code city may: "provide utility service within and without its limits and exercise all powers to the extent authorized by general law for any class of city or town." RCW 35A.80.010.

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[3] Although not of sufficient size to qualify as a second class city, Centralia under the commission form of government exercised all the powers of a second class city. RCW 35.17.030.

In addition to these categorical grants of enumerated powers, the PUD's and cities[4] were authorized, under the statutory provisions that created WPPSS, to: "enter into contracts or compacts with any operating agency or a publicly or privately owned public utility for the purchase and sale of electric energy or falling waters." RCW 43.52.410. Thus, the various statutes clearly provide for Washington PUD's, cities and towns to purchase and sell electricity.

Initially, we must decide whether this agreement is authorized as a purchase of electricity by the participants. As discussed in greater detail *infra*, the purchase of "project capability" under this agreement is essentially an unconditional guaranty of payments on the revenue bonds, secured by a pledge of the participants' utility revenues, in exchange for a share of any power generated by these projects. The agreement expressly provides for the possibility that no electricity will be generated and that participant payments will be due even if the project is not completed. The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity.

II. ACQUISITION OF ELECTRIC GENERATING FACILITIES

Another type of express authority granted to cities and towns is the power to construct, acquire and operate electric generating facilities. RCW 35.92.050. That statute provides:

> A city or town may also construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together

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[4] City is defined in RCW 43.52 as: " 'City means any city or town in the state of Washington authorized to engage in the business of generating and/or distributing electricity." RCW 43.52.250.

> with the right to handle and sell or lease, any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

RCW 35.92.050. Under this provision the municipalities clearly had the authority to build or buy their own plants. *Jones v. Centralia,* 157 Wash. 194, 289 P. 3 (1930). In almost identical language, the PUD's are granted the express authority to construct, acquire and operate electric generating facilities. RCW 54.16.040. The respective powers of the PUD's and cities are similar and therefore subject to a similar construction. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 127-30, 182 P.2d 706 (1947). Under the provisions, the participants clearly could construct, acquire and operate generating facilities.

In construing these provisions, however, this court has never found authority for a project in which the participants did not have an ownership interest. *E.g., Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953); *State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 246 P.2d 1081 (1952). Under this agreement, Section 1.1(*o*) of the Bond Resolution expressly provides that only WPPSS and Pacific Power & Light Supply Company retain any ownership interest in the projects. In comparison, the participants do not retain an ownership share in this project but only contracted to buy from WPPSS a share of project capability. Section 1(v) of the Participants' Agreement defines "project capability" as:

> "Project capability" means the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, inter-

> fered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

The "electric power and energy, if any" language indicates that the parties anticipated a possible share of no power. This impression is reinforced by section 6(d) of the Participants' Agreement which purportedly mandates payment by the participants irrespective of project completion. This so-called "dry hole" provision states:

> The Participant shall make the payments to be made to the Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

In effect, the participants unconditionally guaranteed WPPSS bonds with no guaranty of electricity in return.

Some states have provided statutory authority for such unconditional guaranties and courts have recognized the validity of projects developed under those provisions. *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982). That recognition, however, is based upon very explicit statutory authority. Such Carolina's "Joint Municipal Electric Power and Energy Act" provides an example:

> Any municipality which is a member of the joint agency may contract to buy from the joint agency power and energy required for its present or future requirements, including the capacity and output of one or more specified projects. As the creation of a joint agency is an alternative method whereby a municipality may obtain the benefits

> and assume the responsibilities of ownership in a project, *any such contract may provide that the municipality so contracting shall be obligated to make the payments required by the contract whether or not a project is completed, operable or operating notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a project or the power and energy contracted for,* and that such payments under the contract shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance of the joint agency or any other member of the joint agency under the contract or any other instrument.

(Italics ours.) S.C. Code Ann. § 6-23-110 (Law. Co-op. Supp. 1982). Several other states have similar statutes. Mass.Ann. Laws, ch. 164A, § 3(b) (Law.Co-op. 1979); Me.Rev.Stat.Ann. tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen.Stat. § 159B-12 (1982); Va.Code § 15.1-1611 (1981); Vt.Stat.Ann., tit. 30, § 604 (Supp. 1982). This state has no such statute.

Nonetheless, rather than ruling that an ownership interest is an absolute requirement when acquiring or constructing generating facilities, we will examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest. In the present case, several provisions of the agreement limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed. For example, Section 15 of the Participants' Agreement requires the establishment of a "participants' committee" to meet periodically and to approve or disapprove major decisions relating to the management of projects. Items that are explicitly set out in the agreement to be referred to the committee include: construction budgets, contracts involving more than $2 million and proposed bond regulations. The inclusion of such items suggests a degree of control and involvement in management, yet Section 15 also sets out a procedure for committee consideration of WPPSS proposals that precludes meaningful deliberation on the part of the committee. With limited exceptions, that procedure requires that 20 percent of the

participants register their *disapproval* of any WPPSS proposal within 15 days or that proposal "shall be deemed approved." Considering the complexity of the various budgetary items, construction decisions and financing arrangements involved in a project of this scope, it seems unlikely that a part-time committee of representative participants could provide significant input to the management of the projects with such rigid procedural requirements. It appears to this court that such limited involvement in project management does not satisfy the type of ownership control envisioned in the statutes.

It should be noted that we recognize the necessity and propriety of establishing representative committees to manage and oversee joint development projects. *E.g., Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953); *PUD 1 v. Taxpayers of Snohomish Cy.,* 78 Wash.2d 724, 479 P.2d 61 (1971). Our concern is not with the use of such committees in general; it is with the structuring of such committee procedures in a way that does not allow sufficient participant involvement in project management to control their risk. Thus, although this court recognizes the need for delegating duties in the context of joint development agreements, *e.g., Roehl,* 43 Wash.2d at 238-40, 261 P.2d 92; *Snohomish Cy.,* 78 Wash.2d at 731, 479 P.2d 61, we are not prepared to sanction a virtual abdication of all management functions and policy decisions to an operating agency such as WPPSS. Here, the participant's committee apparently served as a rubber stamp for WPPSS' decisions, resulting in two terminated projects, less than 25 percent complete, at a cost of $2.25 billion, or almost $7 billion over the 30-year repayment period. As a matter of public policy, the enormous risk to ratepayers must be balanced by either the benefit of ownership or substantial management control.

Also, there is language common to each set of statutes indicating the Legislature intended that cities and PUD's should retain significant control over the use of any facilities acquired. For example, the statutes provide that the cities and PUD's have: "full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof . . ." RCW 54.16.040; RCW 35.92.050. While the

public entities had the statutory authority to construct or acquire electric generating facilities, that authority is conditioned upon either an ownership interest or their active participation in the management of these facilities. Here, the municipal and PUD participants were not acquiring or constructing generating facilities as set out in the statutes because under the agreement they ceded virtually all of their ownership interests and most of the management responsibilities to WPPSS.

The need for a municipality or PUD to retain ownership and control over public construction projects is also evident from earlier decisions in which this court considered the PUD's authority to acquire or construct electric generating facilities as the basis for proposed power projects. In 1947 we analyzed the authority of Skagit County PUD to acquire the electricity production and distribution properties of Puget Sound Power & Light Company, an integrated electric generating system. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 182 P.2d 706 (1947). The Skagit County PUD argued that its authority to "purchase, within or without its limits, electric current for sale and distribution within or without its limits", Rem.Rev.Stat. § 11610(d) (Supp. 1945) (now codified as RCW 54.16.040), included the power to buy Puget Power properties. This court carefully reviewed all of the PUD statutes and concluded that the primary purpose of the public utility districts is to furnish electricity to the district and its inhabitants. *Wylie,* at 126, 182 P.2d 706. Therefore, the court concluded the PUD was not authorized to purchase facilities covering 18 counties, when the district needed only 5 percent of that generating capacity. As we stated, such a project would be, "unreasonably large and entirely inappropriate for the accomplishment of the primary purpose of the Skagit district." *Wylie,* at 152, 182 P.2d 706; *accord, Jones v. Centralia,* 157 Wash. 194, 289 P. 3 (1930) (city's power projects held to same standard of unreasonably large or entirely inappropriate). Since this case does not involve a specific challenge to the scale of this project, it is the court's reasoning rather than the result that is relevant. In particular:

> [t]here is nothing . . . which indicates that the act was intended to give public utility districts the power to engage in business beyond their limits on the grandiose scale here contemplated, and there are numerous provisions that are inconsistent with any such idea.

Wylie, 28 Wash.2d at 147, 182 P.2d 706. The court's analysis established that even the express power to buy and sell electricity or to acquire or construct generating facilities may not be exercised in a manner beyond the scope of that primary purpose or such a project would be ultra vires.

These same statutory provisions were analyzed several years later in a case involving the Pend Oreille PUD's decision to build hydroelectric facilities in its own district. *State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 246 P.2d 1081 (1952). Although the proposed project was massive and would have provided a supply of power well beyond the district's needs, this court concluded that the project was within the PUD's statutory authority. The court once again examined the entire PUD statutory scheme, but concluded that the primary purpose of providing power for the district included the duty to secure future power needs, even though at that time the district could use only 10 to 12 percent of the project capacity. *Schwab,* at 824-25, 246 P.2d 1081. Respondents in this case argue that the same principle, providing future district energy needs, applies here and provides sufficient authority for participants to enter into the instant agreement. The extension of that principle is not that simple, however, because in *Schwab* the district retained all ownership interest in the facilities as well as management and control of the project. Here, those same elements of ownership and management are not present and the participant's risks were not subject to their control.

The year after *Schwab* was decided, this court considered a case involving joint development of a generating project and some of the problems of joint management of a project. *Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953). In *Roehl,* five PUD's attempted to acquire the electric utility properties of Puget Sound Power & Light Company. Such a joint effort was authorized under a 1949 amendment to the PUD statutes, Laws

of 1949, ch. 227, § 2, (now codified as RCW 54.16.200). Appellants alleged that the system was unreasonably large under *Wylie* and therefore exceeded the PUD's statutory authority. This court, however, held that the new joint acquisition statute allowed two or more districts to acquire integrated electric facilities beyond district lines. *Roehl,* at 237, 261 P.2d 92. Unlike the provisions governing single districts at issue in *Wylie* and *Schwab,* the new statute did not carry the implication that acquired facilities must be located within or necessary to serve the customers of the purchasing district. *Roehl,* at 237, 261 P.2d 92. The court also addressed the issue of PUD control over the project, concluding that the executive board, consisting of one member from each utility, was responsible for overall project management and policy decisions, while the consulting engineer only performed administrative tasks relating to project operation. *Roehl,* at 240-41, 261 P.2d 92. That same degree of participant control is not present in this case because most of the policy decisions and management control are delegated to WPPSS, the operating agency, rather than any executive committee.

Applying the language of the acquisition or construction statutes and the principles derived from the cases construing that language, we do not believe the participants retained sufficient ownership interests or management responsibilities under this agreement to constitute acquisition or construction of an electric generating facility.

III. IMPLIED POWERS

On separate grounds, respondents urge, and the trial court ruled, that the express authority to acquire or construct generating facilities and provide electricity carries with it an implied power to pay for that service. *Municipality of Metro Seattle v. Seattle,* 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960). In *Metro* this court upheld the City of Seattle's power to pledge city revenues to a countywide agency in order to pay for sewage disposal service. Since the statutes authorized the cities to provide sewage services and systems, we held: "[i]t must follow that with the power to provide a sewer system there is

implied the power to pay for it, unless otherwise prohibited by the charter or statute." *Metro,* at 460, 357 P.2d 863. In the present case, the trial court extended this reasoning and concluded that the implied power to pay also included the power to make financing arrangements such as the present agreement. We disagree.

The services the city contracted for in *Metro* were to be paid as the services were provided, *Metro,* at 458-59, 357 P.2d 863, which is significantly different from the type of unconditional pledge of revenues contained in this agreement. Also, the countywide agency agreed to process and dispose of the sewage in part through the use of the city's existing sewage treatment plants. *Metro,* at 449, 357 P.2d 863. Since the city continued to own the sewage treatment facilities, the revenues pledged were actually paid back to the city for the use of its facilities and these funds helped pay for those plants. That arrangement is distinguishable from the present agreement because here the pledges of revenues are not conditioned upon the receipt of services and in *Metro* the city owned the facility used to provide the services.

This court subsequently adopted a more stringent test for a municipality seeking to incur indebtedness based upon general grants of authority to provide services. In *Edwards v. Renton,* 67 Wash.2d 598, 602, 409 P.2d 153 (1965), we held that the power to borrow money: "should not and will not be inferred or implied from a general statutory authority permitting municipalities to enter into contracts or to incur indebtedness." Moreover, a municipal corporation's powers are limited to those conferred in express terms or those necessarily implied. *In re Seattle,* 96 Wash.2d 616, 629, 638 P.2d 549 (1981). If there is any doubt about a claimed grant of power it must be denied. *Port of Seattle v. State Utils. & Transp. Comm'n,* 92 Wash.2d 789, 794-95, 597 P.2d 383 (1979). The test for necessary or implied municipal powers is legal necessity rather than practical necessity. *Hillis Homes, Inc. v. Snohomish Cy.,* 97 Wash.2d 804, 808, 650 P.2d 193 (1982). As we stated in *Hillis:* " [i]f the Legislature has not authorized the action in question, it is invalid no matter how necessary it might be."

The parties argue that first class cities have greater powers than other municipalities, which precludes a narrow statutory construction. Generally, first class cities may exercise powers that do not violate a constitutional provision, legislative enactment, or the city's own charter. *Winkenwerder v. Yakima,* 52 Wash.2d 617, 622-23, 328 P.2d 873 (1958). These broad powers are derived from first class cities' status as "home rule" municipalities, *i.e.,* cities that frame their own charters and consequently retain broad control over local matters. Const. art. 11, § 10. In some states, the home rule powers of municipalities result in considerable autonomy from state control. *E.g., Board of Cy. Comm'rs v. Thornton,* Colo., 629 P.2d 605, 609-10 (1981). In Washington, the courts have interpreted the home rule powers of first class cities more narrowly. Professor Trautman perceptively characterized these limitations:

> The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interests is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of the municipal corporation, it is necessary that an authorization to act from the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied.

Trautman, *Legislative Control of Municipal Corporations in Washington,* 38 Wash.L.Rev. 743, 772 (1963). This court has applied that reasoning: "[t]herefore, at least when the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature." *Massie v. Brown,* 84

Wash.2d 490, 492, 527 P.2d 476 (1974). Thus, the question is whether the State has acted in a manner inconsistent with the powers asserted here; or, the State has not acted, but has either a paramount interest or a joint interest with local municipalities.

The development of generating facilities through the joint efforts of municipalities and other public bodies is a subject of at least joint state and local interest. As reflected in both legislative enactments, *e.g.*, RCW 54.44, and decisions of this court, *e.g.*, *Shorts v. Seattle*, 95 Wash. 538, 164 P. 241 (1917), the State is vitally interested in the diverse municipal powers that might be employed in this type of project. Because of the obvious state interest, either an express or implied delegation of power is necessary to find sufficient authority.

The holding in *Hillis* vitiates the arguments that this type of bond guaranty was a necessity to sell the bonds in the investment market. That may well be true, but necessity does not provide authority. Accordingly, we do not believe that this agreement is authorized as an implied power to pay for an admittedly proper municipal service.

IV. JOINT OPERATING AGREEMENTS

Another possible independent source of express power is the joint operating statutes under which WPPSS was created. RCW 43.52. As quoted previously, these provisions clearly authorize the participants to purchase "electric energy". RCW 43.52.410. By comparison, a joint operating agency is authorized to contract with any municipal corporation or public utility "for any term relating to the purchase, sale, interchange or wheeling of power". RCW 43.52.391. This difference in language indicates a critical distinction between the grants of authority to the participants and to WPPSS, because the city and PUD's authority is significantly more limited. If WPPSS were simply selling the electric energy, the participants obviously would be authorized to buy it. However, since the terms of the agreement encompass only a potential share of any electricity that might be generated, it is not accurate to analyze the participants' authority in terms of purchasing electric

energy. Since the statutes do not provide for the purchase of electric energy that may not be generated, we can discern no basis for the participants' authority in RCW 43.52.

V. JOINT DEVELOPMENT AGREEMENTS

A final category of express authority that could be involved in this type project, but was not employed in the present case, [5] is contained in the: "Nuclear, Thermal, Electric Generating Power Facilities—Joint Development", RCW 54.44. Under this statute, public entities explicitly are authorized to enter into agreements for the joint development of nuclear, thermal, or electric generating facilities. *See, e.g., PUD 1 v. Taxpayers of Snohomish Cy.,* 78 Wash.2d 724, 479 P.2d 61 (1971). Although there is no indication in the record as to why this chapter was not used, there are statutory requirements under RCW 54.44 notably absent from this agreement. For example, as joint developers the participants would have an ownership interest in any facility built. RCW 54.44.020. By comparison, the participants' only ownership interest under the present agreement is the right to share in the distribution of any excess assets at the termination of the project as set out in Section 13(a)(iii) of the Participants' Agreement. The participants do retain a share of project capability in an amount equal to their percentage share in the project, but as explained above, that share might amount to nothing, as it in fact does here. Also, no share could be sold without approval of 80 percent of the other participants. Moreover, even if they obtained consent to sell, a participant, according to the agreement, would remain liable for its obligation despite any assignment to another party.

A second statutory requirement under RCW 54.44 is that each participant is responsible only for its own debts and obligation in the facility. RCW 54.44.030. In contrast, section 17(c) of the Participants' Agreement explicitly requires that

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[5] Actually, WPPSS contracted under RCW 54.44 with Pacific Power & Light Company to give that private company a 10 percent ownership share of plant No. 5. The contracts with the remaining participants do not, however, involve that statute.

participants assume the obligations of defaulting participants. If any municipal participant defaults, the remaining municipal participants' share is automatically increased pro rata. Thus, a participant would expressly assume the debt of any defaulting participant. Since the record indicates that from the outset of the projects there were questions about the statutory authority of some 16 participants, it seems likely that the municipalities and PUD's would incur a greater obligation than they initially contracted for. Such an assumption of liability is expressly forbidden under the joint development provisions of RCW 54.44.030. In contrast, the South Carolina statute provides an example of express authority for such obligations:

> Any contract with respect to the sale or purchase of capacity or output of a project entered into between a joint agency and its member municipalities may also provide that if one or more of such municipalities shall default in the payment of its or their obligations with respect to the purchase of said capacity or output, then in that event the remaining member municipalities which are purchasing capacity and output under the contract shall be required to accept and pay for and shall be entitled proportionately to and may use or otherwise dispose of the capacity or output which was to be purchased by the defaulting municipality.

S.C.Code Ann. § 6-23-110 (Law.Co-op. Supp. 1982). Again, we have no such statute in this state.

Although other state courts have upheld such step-up provisions despite the lack of express statutory authority, *e.g.*, *Frank v. Cody*, 572 P.2d 1106, 1111-12 (Wyo. 1977), we are not persuaded that a similar conclusion is appropriate here. In *Cody* the court found the participants retained an ownership interest in the joint project and a significant role in managing the project. *Cody*, at 1111. Moreover, default may have been less likely since payments were only due after the utility services were delivered. *Cody*, at 1113-14. *Accord, Goreham v. Des Moines Metro Area Solid Waste Agency*, 179 N.W.2d 449, 457 (Iowa 1970). Here, the lack of an ownership interest coupled with the "dry hole" risk preclude a similar result.

It is instructive to review this court's previous analysis of a project based upon RCW 54.44 because it demonstrates the application of that statute to a viable project. In *PUD 1 v. Taxpayers of Snohomish Cy.*, 78 Wash.2d 724, 479 P.2d 61 (1971), we analyzed the joint development, by both public and private participants, of a coal-powered electric generating plant under the authority of RCW 54.44. Our decision concerned constitutional questions rather than statutory authority because the agreement was negotiated to conform to RCW 54.44. In challenging the agreement, appellants alleged that the PUD participants violated Const. art. 8, § 7 by giving or loaning credit in aid of their private coparticipants or by impermissibly owning stocks in a private corporation. This court found the arrangement valid under the constitution, reasoning that because under the statutory requirements the public participants were severally liable for their own acts and could not be assessed for the obligation of other participants, the public participants were not loaning or giving credit. *Snohomish Cy.*, at 726-27, 479 P.2d 61. As the court characterized the agreement: "[r]espondents are purchasing an ownership interest, and not only is their liability limited to their own acts, but their investment is restricted to an indebtedness proportionate to their individual participation." *Snohomish Cy.*, at 728, 479 P.2d 61. Those same procedural safeguards are not only absent from the present arrangement, they are explicitly contradicted under the step-up provision included in section 17(c) of the Participants' Agreement and the definition of project capability in section 1(v).

VI. CONCLUSION

We recently reaffirmed the application of the ultra vires doctrine in the area of government contracts. *Noel v. Cole,* 98 Wash.2d 375, 655 P.2d 245 (1982). As a general rule, the unauthorized contracts of governmental entities are rendered void and unenforceable under the ultra vires doctrine. *Noel,* at 378, 655 P.2d 245. The doctrine applies to government action to "protect the citizens and taxpayers . . . from unjust, ill-considered, or extortionate contracts, or those showing favoritism . . ." 10 E. McQuillin, *Municipal Corporations* § 29.02, at

200 (3d ed. 1981). Also, "[t]he rationale for the rule is the protection of those unsuspecting individuals whom the entity represents." *Noel,* at 378, 655 P.2d 245. In *Noel* this court held a logging contract between the State Department of Natural Resources and a private company ultra vires because of the parties' failure to conform to mandatory statutory procedures.

In the present case, the participants lacked substantive authority to enter into this type of contract because they constructed an elaborate financing arrangement that required the participants to guarantee bond payments irrespective of whether the plant was ever completed; to surrender ownership interest and considerable control to WPPSS; and to assume the obligations of defaulting participants. As such, these contracts failed to protect unsuspecting individuals, the ratepayers, represented by the participants. By choosing such an alternative arrangement in lieu of a statutory scheme that incorporated protections against those very liabilities, the participants exceeded their statutory authority, rendering the contracts ultra vires.

Although we have discussed our conclusions throughout the opinion, it is helpful to summarize. It should be apparent that this agreement does not satisfy the statutory scheme governing the public participants. (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retained no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy."

Our conclusion is that the Washington statutes authorize the participants to purchase power or to own electric generating facilities. An attempt to structure an agreement under the joint operating agency statutes or to base it upon implied powers does not alter that basic authority and the participants simply are not authorized to guarantee another party's ownership of a generating facility in exchange for a possible share of any electricity generated. Therefore, we hold that the Washington PUD's and Washington municipal participants lacked authority to enter into this agreement.

The trial court ruling that the Washington PUD's, cities and towns had authority to enter into this agreement is reversed.

WILLIAM H. WILLIAMS, C.J., ROSELLINI, DIMMICK and PEARSON, JJ., and MORGAN, J. Pro Tem., concur.

DORE, Justice (concurring).

I concur in the result reached by the majority. For the reasons discussed below, I am compelled to add my own analysis to that proffered by the majority.

I

I agree with the majority that "this court has never found authority for a project in which the participants did not have an ownership interest". Majority, at 336. Unlike the majority, however, I do not find it necessary to examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the "equivalent" of an ownership interest. Majority, at 337. "Ownership" has been defined as the "complete dominion, title, or proprietary right in a thing or claim". Black's Law Dictionary 997 (5th ed. 1979). I believe an ownership interest is an *absolute* requirement when acquiring or constructing generating facilities.

If the parties had wished to become co-owners of the projects, with the participants sharing in the benefits and burdens of ownership, they would have structured the contract according to RCW 54.44, governing joint ownership of nuclear

power plants. This is the statutory framework which governs the ownership agreement between Washington Public Power Supply System (WPPSS) and Pacific Power & Light Company (PP & L), which owns 10 percent of project 5. RCW 54.44, however, is not the statutory framework governing the relationship between WPPSS and the 88 participants. That relationship is governed by RCW 43.52. Under that chapter, WPPSS is authorized to construct and operate the projects and can sell electrical output to other utilities.

This court has held that the power to incur indebtedness cannot be inferred or implied from general statutory authority permitting municipalities to enter into contracts. In *Edwards v. Renton,* 67 Wash.2d 598, 409 P.2d 153 (1965), we made clear the need for express statutory authority for municipalities to enter into financial arrangements. As the present majority notes, other states have provided explicit statutory authority for unconditional guaranties such as the one in the present case. The Legislature of the state of Washington, however, has *not* provided our state with such statutory authority. Actual ownership is essential.

Under the "equivalent of ownership interest" analysis employed by the majority, project designers could conceivably allow enough democratic control by participants that there would be authority for a project which the participants did not actually own. I would hold that *both* an ownership interest *and* active participation in the management of the facilities is mandatory.

II

The dissent fails to address the constitution and statutes of this state which specifically limit the amount of indebtedness that a municipality can incur. Article 8, section 6 of the Washington State Constitution provides that a municipality shall not become indebted in an amount in excess of 1½ percent of the value of the taxable property of that municipality without the assent of ⅗ of the voters therein, nor under any circum-

stances incur indebtedness in excess of 5 percent of the value of the taxable property therein. The power of municipalities to incur indebtedness has been further circumscribed by the Legislature. RCW 39.30.010 and RCW 39.36.020(2), for example, prohibit cities incurring debt exceeding ¾ of 1 percent of their assessed property value without first obtaining permission from their citizens by a public vote.

By the terms of the Participants' Agreement, each participant committed itself to buy from WPPSS a share of "project capability". The price was a share of the cost of the project to WPPSS. For ten participant Washington cities, the share of the anticipated price which each committed itself to pay exceeded the debt allowable by law.[6] No public vote approved any of these undertakings.

The public policies behind these debt limitations are not in doubt. As stated in 56 Am.Jur.2d *Municipal Corporations* § 599, at 651 (1971):

> The clear and unmistakable purpose of such provisions is effectually to protect persons residing in municipalities or counties from the abuse of their credit and the consequent oppression of burdensome, if not ruinous, taxation.

Accord, 15 McQuillin *Municipal Corporations* § 41.02 (3d ed. 1970); *Gruen v. State Tax Comm'n,* 35 Wash.2d 1, 211 P.2d 651 (1949).

I am not persuaded by the trial court's determination that, because the obligations of the public utility district participants were payable out of electric utility revenues, they were exempt from constitutional scrutiny under the special fund doctrine. The trial court's rationale ignores the purpose of the special fund doctrine and provides a glaring loophole by which clever draftsmen could escape the constitutional debt restrictions.

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[6] These cities include Richland, Tacoma, Alder, Blaine, Centralia, Ellensburg, McCleary, Port Angeles, Steilacoom and Sumas. The magnitude of the commitments range from almost seven times the allowable debt in the case of Port Angeles to almost 36 times what the statutes would permit in the case of McCleary.

The special fund doctrine was last addressed by this court in *State ex rel. State Fin. Comm. v. Martin,* 62 Wash.2d 645, 661, 384 P.2d 833 (1963):

> That the special fund doctrine is a useful and valid tool of government is apparent when one thinks of all of the institutions and devices of government supported by it. But the true test of its application here is not what comes out of the fund, but what goes into it. If the revenues in it derive exclusively from the operation of the device or organ of government financed by the fund, as in the case of a toll bridge, or the operation of the State Liquor Control Board, or from sales or leases of publicly owned lands, any securities issued solely upon the credit of the fund are not debts of the state, but debts of the fund only. But if the state undertakes or agrees to provide any part of the fund from any general tax, be it excise or ad valorem, then securities issued upon the credit of the fund are likewise issued upon the credit of the state and are in truth debts of the state. *Hence, we must take care that the employment of peripheral doctrines does not lead us away from the main point of the case. What is a debt of the State of Washington? Any obligation which must in law be paid from any taxes levied generally is, we think, a debt of the state.* It matters little whether the tax be ad valorem or an excise. (Italics mine.)

Thus, the special fund doctrine is to be analyzed in terms of the purpose for the constitutional limitation. The employment of "peripheral doctrines," as noted above, should not detract from the primary purpose of concern: does the device employed create the evil the constitutional limitation was designed to avoid? If such is the case, there is "debt" for constitutional analysis purposes.

Traditionally this court has not applied the special fund doctrine mechanically. This point is illustrated by the case of *Twichell v. Seattle,* 106 Wash. 32, 179 P. 127 (1919), where the City of Seattle issued bonds to purchase an already existing street railway system as an addition to the city's railway system.

The City had pledged to pay the bonds out of the revenues of the city's entire railway system, not just out of that portion of the system being purchased by the proceeds of the bonds. Rather than applying a mechanical rule, the court focused on the risk to the taxpaying public. As the addition being purchased was already existing and operating in the hands of a private company, it was obvious this was not a speculative venture which might fail to materialize. Thus, the reason for the application of the debt limitation did not exist, and the obligation was not considered to be constitutional debt.

This court reached just the opposite result in *State ex rel. State Bldg. Fin. Auth. v. Yelle,* 47 Wash.2d 705, 289 P.2d 355 (1955). That case involved the State Building Financing Authority (Authority) which would purchase land, build buildings, then lease the buildings to various State departments and agencies for a rental fee designed to cover the debt service on bonds issued by the Authority to pay for the buildup. The Authority's sole source of income was the rentals for the buildings, and the bonds were payable out of those rental receipts. Applied mechanically, the special fund doctrine would not save the scheme from constitutional attack, because the debt was payable solely out of the revenues of the projects being financed. Yet this court looked to the substance of the transaction, rather than to its form. The court held that the special fund doctrine did not apply because some of the rents were paid out of general tax revenues. The court found the taxpaying public was taking the risk:

> When we strip the plan down to fundamentals, we find that it is not a leasing arrangement between landlord and tenant, but the installment purchase by the state of certain buildings and facilities with state moneys raised by taxation, far in excess of the constitutional limitation.

47 Wash.2d, at 715, 289 P.2d 355.

The facts of the present case are very similar to the State Building Financing Authority case. Here, WPPSS played the role of a financing conduit for the participants, just as the Authority was a financing conduit for the State. Just as the

Authority attempted to issue "revenue" bonds that were, in fact, secured by the Legislature's promise to appropriate funds adequate to pay debt service, so WPPSS has issued "revenue" bonds that are, in fact, secured by the participants' promise to collect funds adequate to pay debt service, notwithstanding the noncompletion of the facilities (plants 4 and 5). This court cannot insulate third party conduit financier schemes from the constitutional safeguard of the debt limitation.

III

Section 6(d)

The Participants' Agreement does not specify that the participants must pay for either decommissioning costs or debt service if the plants are not completed and operating. Section 6(d) provides that the participants must make the payments called for under the Agreement whether or not the projects are completed, but doesn't specify what payments are called for. The Agreement provides that the participants have to pay their respective shares of whatever is in the Annual Budget, as defined in Section 1(a) of the Agreement. The ultimate issue is whether the Annual Budget includes *debt service* and *decommissioning costs* if the projects are terminated before completion and before they go into operation generating electricity.

Debt Service

The bonds in question are "revenue" bonds, not general obligation bonds, and payable solely out of any revenues to be generated by the projects. If the projects for which revenue bonds are sold do not generate revenues, the bonds are not paid. The bonds themselves and the Bond Resolution clearly provide that, except for interest during construction, the bonds are payable solely out of revenues to be earned by WPPSS from the sale of "power and energy" (that is, electricity) from the plants. Because the plants are unfinished, there is no electricity to sell, and hence no revenues. There is no obligation to pay revenue bonds where there are no revenues.

It is not difficult to determine why the bonds were issued as revenue bonds rather than general obligation bonds. The statutes governing WPPSS allow it to issue revenue bonds "payable from the revenues of the utility properties operated by it" (RCW 43.52.3411) and expressly prohibit it from issuing general obligation bonds (RCW 43.52.391). The reason that the Legislature allowed WPPSS to issue revenue bonds but not general obligation bonds was to guard against precisely the situation now before this court: the economic, political and legal problem of asking the citizens of Washington and its neighboring states to pay billions of dollars for failed projects which will never produce any revenues. If the bonds were general obligation bonds, the risk of project failure would be on citizens who would have been entitled to vote on whether to undertake the project risks. Because the bonds are labeled as revenue bonds, however, the risk of project failure should be on the investors who bought the bonds knowing the sole source of payment was to be the revenues from the sale of electricity which was expected to be generated.

The Participants' Agreement must be read in light of the statutory framework governing WPPSS and the participants. If the parties had wished to become co-owners of the projects, with the participants sharing in the benefits and burdens of ownership (such as the risk of failure), they would have structured the contract according to RCW 54.44 governing joint ownership of nuclear power plants. That is the statutory framework which governs the ownership agreement between WPPSS and PP & L whereby WPPSS owns 90 percent and PP & L owns 10 percent of project 5. However, RCW 54.44 is *not* the statutory framework governing the relationship between WPPSS and the 88 participants. That relationship is governed by RCW 43.52, which does not allow WPPSS to put an ownership risk on the purchases of that electric energy.

Decommissioning Costs

As the projects were terminated before completion, decommissioning costs should be excluded from the Annual Budget as "costs of construction," and should be paid out of the construction fund provided, not by participants.

The trial court decided as a matter of law that the Agreement requires the participants to pay WPPSS for decommissioning costs as part of the Annual Budget. That is plainly contrary to the clear language of the Agreement and Resolution.

The Annual Budget excludes "costs of construction as defined in the Bond Resolution". Section 1(a) of the Agreement, at 3 and 4. Section 6.9J of the Bond Resolution, at pages 46 and 47, specifically includes as a cost of construction:

> The *costs of decommissioning* any Project terminated prior to the [completion of construction], which costs shall include but shall not be limited to all of the System's accrued costs and liabilities, including cost of Fuel, of such Project and the salvage, discontinuance and disposition thereof . . . (Italics mine.)

Costs of decommissioning the projects if they are terminated prior to completion are "costs of construction as defined in the Bond Resolution" and, therefore, are excluded from the Annual Budget. Section 6.9J of the Bond Resolution, at 46; Section 1(a) of the Participants' Agreement, at 3.

The trial court's reasoning ignores the fundamental scheme of the Participants' Agreement and Bond Resolution and is contrary to the plain language of the documents. The Resolution explicitly provides that (1) costs of construction shall be paid from moneys in the construction fund (section 6.9, at 44); (2) the moneys in the construction fund shall come from the sale of bonds (section 6.8, at 43), and (3) WPPSS will sell enough bonds to pay all costs of construction (section 3.2 at 17). WPPSS' chief New York bond lawyer, who drafted the documents, testified:

> Q. Where does the money come from that gets into the construction fund?
>
> A. From bond proceeds.
>
> Q. As you interpret the bond resolution does any money which the participants are to pay to the Supply System ever get into the construction fund?

A. I don't believe so.

* * * * *

Q. Does the bond resolution provide that . . . all costs of construction are to be paid from monies in the construction fund?

[Objection]

A. Yes.

Clerk's papers, at 705-06.

When they signed the Participants' Agreement in 1976, the participants agreed to pay for items properly includable in the Annual Budget but not for "costs of construction," which were expressly *excluded* from the Annual Budget. The exclusion was no accident: the exclusion language was specifically *added* to earlier drafts of the Agreement to insure that the participants would not have to pay such costs.

The draft of September 24, 1974, shows the following handwritten note made by one of WPPSS' lawyer-draftsmen next to the construction cost exclusion:

> make sure annual budget only include[s] costs of ea. project after D. of Co. Op. [Date of Continuous Operation, i.e., completion] or date certain [July 1, 1988].

Clerk's papers, at 4373. Thus, if there is any doubt about the parties' intent, the extrinsic evidence from the files and testimony of WPPSS' own lawyers who drafted the documents shows that precompletion costs, such as costs of decommissioning uncompleted plants which by definition are "costs of construction," were intended to be *excluded* from the Annual Budget. They were to be paid from bond proceeds in the construction fund, not by the participants.

The costs of "termination" are mentioned in the second sentence of the definition of "Annual Budget". It provides for "costs . . . resulting from the ownership, *operation* and *maintenance* of the Projects, repairs, renewals, replacements, and additions thereto and costs of termination thereof as provided in Section 13". (Italics mine.) Participants' Agreement, at 4. It

is clear from the context that the sentence refers to *completed* plants. Only completed plants have operation and maintenance costs, or need repairs, renewals, replacements or additions.

Moreover, if the reference to costs of "termination" was construed to embrace precompletion decommissioning costs, there would be an absolute and unavoidable contradiction between the first sentence (which excludes precompletion decommissioning costs as "costs of construction") and the second sentence. If possible, an agreement should be interpreted in a way which will avoid such inherent contradictions.

Thus, all costs of construction as defined in the Bond Resolution, such as costs of decommissioning uncompleted plants, are excluded from the Annual Budget because they are to be paid out of the bond proceeds in the construction fund, not by the participants. Additionally, costs of "termination . . . as provided in section 13" are included in the annual budget only after a project has been completed and has gone into operation before being terminated. Accordingly, I strongly disagree with the trial court's conclusion that as a matter of law the Agreement unambiguously includes the costs of decommissioning uncompleted plants in the Annual Budget.

Even if decommissioning costs were payable under section 13 of the Agreement, they are not payable until WPPSS renders a final accounting statement. As costs of decommissioning uncompleted plants are to be paid out of the construction fund, not by the participants, the participants can be called upon to pay decommissioning costs only after a plant has been completed and has gone into operation before being terminated. Once a plant is completed, the costs of decommissioning it would no longer be a "cost of construction" under section 6.9J of the Bond Resolution. Hence, the decommissioning costs would not be payable out of the construction fund and would have to be paid by the participants under section 13 of the Participants' Agreement.

Section 13(a)(iii), however, clearly provides that decommissioning costs are payable by the participants only after WPPSS renders a "final accounting statement" at the end of the decommissioning process. The monthly accounting

statements required under section 13(a)(ii) are for reporting purposes only. Significantly, the earlier drafts of the Agreement (Clerk's papers, at 4283, 4321, 4357, 4399, 4452 and 4548) all required monthly payments based on the monthly accounting statements, but the drafts of February 27, 1975 and later deleted the monthly payments and based the payments solely on the final accounting statement. Clerk's papers, at 4602 and 4768, and Agreement section 13(a)(ii) and (iii). Presumably, the Agreement does not require participants to pay for decommissioning costs until the final accounting statement is rendered because it cannot be known until then whether the ultimate result of decommissioning will be a debit or credit for the participants.

Thus, as discussed above, the section 13 payment provisions do not apply in the present context or precompletion decommissioning. Even if they did apply, the participants would not have to pay for decommissioning costs until WPPSS had rendered a final accounting statement at the end of the decommissioning process.

Conclusion

From reading the record, it is clear that the monumental crisis brought on by WPPSS was created by the simultaneous construction of five nuclear plants, as well as mismanagement. To save itself, WPPSS has asked us to approve a plan to mortgage the futures of ratepayers by requiring huge increases in electricity rates, in exchange for nothing, in violation of our statutes and state constitution. This we cannot do.[7]

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[7] Citing RAP 13.7, writer of the dissenting opinion limits himself to the statutory authority questions presented by the parties. I do not find RAP 13.7 applicable, as it specifically pertains only to issues to be considered by this court upon acceptance of review of a Court of Appeals' decision. Even if applicable, however, RAP 13.7 permits this court to limit the issues only at the time of the granting of the motion or petition, not after oral presentation. I find it impossible to discuss statutory authority without interpreting the Participants' Agreement and Bond Resolution, including section 6(d). The contract interpretation and statutory authority issues are so intertwined it is necessary to address the interpretation issues in determining the authority issues.

I concur in the result of the majority.

UTTER, Justice (dissenting).

I dissent. The majority, by its narrow reading of municipal authority to provide electric power, places constraints on municipalities not intended by the Legislature. Municipal authority in this area must be read broadly to provide the flexibility which is absolutely crucial in furnishing such a capital-intensive service. The contractual arrangement in the present case is a form of purchase which, viewed at the time the contract was made, may well have been the most economically advantageous for all concerned. While the result has been tragic, the decision here today may not free municipalities of all potential costs in even the present case, will bar them from potentially advantageous contracts in the future, and may well make financing of future projects more costly.

It is natural for anyone viewing the enormity of the mismanagement in this project and the calamitous impact of its failures on utilities and ratepayers to seek ways to negate the impact. Nonetheless, I cannot agree that the approach taken by the majority is either a proper or necessary way to solve the problem.

Initially, it is important to characterize exactly what it is that the participants contracted for. As the majority points out, the contract cannot be characterized as purchase of an ownership interest in a power plant, for the interest held by the participants lacks several important indicia of ownership. Neither does the contract represent a purchase, in the ordinary sense, of actual electric power, for it expressly provides for the possibility, which in fact has materialized, that no power would be produced.

Instead, the contracts are best characterized as a purchase of a *possibility* of power. In return for consideration in the form of guaranty of the revenue bonds, the participants received not guaranteed power but an exclusive right to power which might or might not materialize. The advantage to the participants was that this power might be significantly cheaper than available alternatives or might even be the *only* alternative available.

While the contract has the disadvantage of requiring payment for a potential "dry hole", this is true of other standard contracts as well. For example, the buyer in an option contract may well end up paying something for nothing if, when the time comes for it to exercise the option, it chooses not to do so because the terms are no longer economically advantageous.

The majority concedes, as it must, that all of the participants have the authority to "enter into contracts or compacts . . . for the purchase and sale of electric energy". RCW 43.52.410. The issue before us is whether a proper construction of this language includes the purchase of a possibility of electric power. The majority simply concludes that it does not. I find the issue more difficult.

Statutes such as RCW 43.52.410 are to be liberally construed so as to further their purpose of furnishing power to the people. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 146, 182 P.2d 706 (1947); RCW 43.52.910 *See generally Pacific Cy. v. Sherwood Pac., Inc.,* 17 Wash.App. 790, 795, 567 P.2d 642 (1977) (statutes relating to the public health and welfare should be liberally construed). As was noted by another court in a similar case:

> The legislature has clearly pointed up that it intended to extend liberally to municipal electric utilities the same benefits and efficiency available to other utilities, through combined ownership of a generating system. It would be an impossible and impracticable demand for us to insist on the legislature providing every little detail on how to go about carrying out an authority bestowed. In the absence of some good reason to do so, we should not apply a construction which would nullify, destroy or defeat the intention of the legislature.

Frank v. Cody, 572 P.2d 1106, 1115 (Wyo. 1977).

In light of this rule of liberal construction, I believe this court should construe RCW 43.52.410 to authorize purchase of a possibility of power as well as more typical purchase contracts. Such contracts may in some circumstances be highly

advisable. Option contracts, especially when used in an unpredictable market in which periodic gluts and shortages are common, are a good example. Several years ago, for example, a municipality operating an oil-burning power plant seemingly might have been well advised, in the face of escalating oil prices, to enter a long-term contract to purchase oil at the then prevailing price. Yet in light of recent price declines, such a contract would have left the municipality bound to pay significantly more than the current price. The solution—an option contract which would permit the municipality, by exercising its option, to avoid any price increases and yet still, by choosing not to exercise its option, take advantage of any price declines.

The purchase of a possibility of power in the present case no doubt seemed equally advisable in 1974, when steadily rising energy prices were predicted and the costs of the proposed power plants seemed manageable. That a loose market and other economic factors made completion of the plants infeasible and required their termination is no different from a fall in oil prices which might make the hypothetical purchase option described above economically worthless. The participants are no more entitled to a refund of their consideration here, *i.e.*, relief from their bond guaranties, than they would be entitled to a refund of the consideration paid for the option contract. As RCW 43.52.410 should permit option contracts, so it should permit agreements such as that in the present case.

Further support for this conclusion is provided by the Legislature's failure to react at all to the well publicized contracts at issue here. WPPSS is a public entity which is purely a creature of statute. *See* RCW 43.52. Legislative acquiescence in such an entity's interpretation of the statutes under which it operates is a significant indication of legislative intent. *Cf. Washington Educ. Ass'n v. Smith*, 96 Wash.2d 601, 606, 638 P.2d 77 (1981) (legislative acquiescence in Attorney General interpretation); *Spokane Methodist Homes, Inc. v. Department of Labor & Indus.*, 81 Wash.2d 283, 287, 501 P.2d 589 (1972) (legislative acquiescence in court interpretation); *Morin v. Johnson*, 49 Wash.2d 275, 279, 300 P.2d 569 (1956)

(legislative acquiescence in interpretation by administrative agency). The various purchasers of bonds undoubtedly relied on legislative acquiescence in this case.

Other courts which have considered the validity of contracts containing comparable "dry hole" provisions have reached conclusions similar to mine. While most of those cases are factually distinguishable, they are unanimous in upholding such provisions. *See Board of Comm'rs v. All Taxpayers, Property Owners, & Citizens,* 360 So.2d 863 (La. 1978); *State ex rel. Mitchell v. Silkeston,* 555 S.W.2d 281 (Mo.1977); *Johnson v. Piedmont Mun. Power Agency,* 277 S.C. 345, 287 S.E.2d 476 (1982); *State ex rel. Grimes Cy. Taxpayers Ass'n v. Texas Mun. Power Agency,* 565 S.W.2d 258 (Tex.Civ.App. 1978); *Frank v. Cody, supra. State ex rel. Mitchell v. Silkeston, supra,* actually involved a fact situation almost identical to that in the present case. There, four cities entered into contracts with a neighboring city whereby they agreed to pay for a specified quantity of electric power whether or not actually needed *and whether or not actually available. Mitchell,* at 283-84. Despite this "dry hole" provision and a complete lack of any ownership interest at all, the court did not even question the authority of the purchaser cities. *See Mitchell,* at 291.

We should reject the majority's narrow interpretation of RCW 43.52.410. Municipalities exercising their authority to provide electric power to their citizens must be given the freedom and flexibility to use all advisable means. Their determinations of advisability, moreover, are not subject to judicial review, except to the extent that they are arbitrary and capricious. *See State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 829-31, 246 P.2d 1081 (1952). I would hold that the participants did possess authority to enter into the contracts at issue here.

I will not respond to the concurring opinion. There are compelling reasons for determining the issues of law addressed in that opinion in a different manner. Some of these were stated by the trial court, others were presented to us in oral argument and in the briefs of the parties.

Because the majority has deliberately chosen to refrain from addressing these remaining issues (*see* majority opinion, at page 334 n.1), I do so as well. However, our silence should not be mistaken for acquiescence in the views of the writer of the concurring opinion. RAP 13.7(b) expressly authorizes us to limit the issues which we address in reviewing an opinion of the Court of Appeals and this must encompass the power to so limit our review at any time prior to issuing a decision. While RAP 2.4, which governs direct discretionary review, does not expressly allow such limitation, such power must be implied in light of RAP 13.7(b) and the nature of discretionary review. *See also* RAP 18.8(a) (appellate court may waive or alter rules of appellate procedure). To hold otherwise would allow a party seeking discretionary review to force an appellate court to choose between reviewing none or all of numerous issues that party might present. This would conflict with the basic concept of discretionary review, that it is discretionary.

I dissent.

DOLLIVER, J., concurs.

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,

Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,

Defendants.

NO. 82-2-06840-3

Order Denying Motion For Reconsideration of Order And Judgment

This court entered an Order and Judgment on August 11, 1983. Thereafter Chemical Bank filed a motion for reconsideration of the Order and Judgment. On August 23, 1983 the Supply System joined in Chemical's motion for reconsideration. Various defendants filed memoranda opposing the motion for reconsideration, and on August 29, 1983 Chemical filed a reply memorandum in support of its motion for reconsideration. This court permitted counsel for Chemical Bank to present oral argument in support of its motion at a hearing on August 29, 1983. The Court having read and duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein, and the court having announced its oral decision on the aforesaid motion at the hearing on August 29, 1983 following the presentation of oral argument by Chemical Bank, now, therefore, for the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

ORDERED as follows:

1. The aforesaid motion by Chemical Bank, joined in by the Supply System, for reconsideration of this court's Order And Judgment entered on August 11, 1983, is hereby denied; and

2. The arguments and contentions raised by Chemical Bank in support of its motion for reconsideration, including but not limited to its arguments and contentions regarding alleged violations of the United States Constitution and of the Constitution of the State of Washington (and constitutions of other states where defendants are located), are hereby rejected for the reasons stated in the court's oral decision.

DONE IN OPEN COURT this 16th day of September, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK, a New York corporation, Plaintiff, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al., Defendants.	NO. 82-2-06840-3 **Appendix To Order Denying Motion For Reconsideration Of Order And Judgment**

The court has considered the following pleadings, papers and materials in reaching its Order Denying Motion For Reconsideration Of Order And Judgment:

Name of Document	Date
(Chemical Bank's) Motion for Reconsideration	August 18, 1983
Memorandum of Chemical Bank in Support Of Its Motion For Reconsideration Of The Judgment	August 18, 1983
Note For Motion Docket (regarding Motion For Reconsideration Of Order And Judgment Entered August 11, 1983)	August 18, 1983
Supply System's Motion For Reconsideration and Joinder in Chemical Bank's Motion For Reconsideration	August 23, 1983
Columbia Defendants' Memorandum In Opposition To Chemical Bank's Motion For Reconsideration	August 25, 1983
Memorandum of Nine Defendants In Opposition To Chemical Bank Motion For Reconsideration of The Judgment	August 25, 1983
Response of 21 Defendants To Plaintiff's Motion For Reconsideration Of Judgment	August 25, 1983

Name of Document	Date
Memorandum of City of Richland, Chelan County PUD No. 1 And Grant County PUD No. 2 In Opposition To Motion of Chemical Bank For Reconsideration	August 25, 1983
(Washington Public Utilities Group) Opposition To Motion For Reconsideration Of The Judgment	August 26, 1983
Oregon PUDs' Memorandum in Opposition to Chemical Bank's Motion For Reconsideration	August 26, 1983
Memorandum Of City of Ellensburg, Public Utility District No. 1 of Wahkiakum And Public Utility District No. 1 of Pend Oreille In Opposition To Motion For Reconsideration	August 26, 1983
Response of Snohomish and Clallam Public Utility Districts To Memorandum of Chemical Bank In Support Of Motion For Reconsideration	August 26, 1983
Chemical Bank's Reply Memorandum On Its Motion For Reconsideration	August 29, 1983

The court previously considered the pleadings, papers and materials listed in the Appendix to Order And Judgment dated August 11, 1983.

DONE IN OPEN COURT this 16 day of September, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for
Columbia Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK OF NEW YORK,

Plaintiff,

vs,

No. 82-2-06840-3

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.,*

Defendants.

VERBATIM REPORT OF PROCEEDINGS

BEFORE

THE HONORABLE JOSEPH COLEMAN

9:30 a.m.
August 29, 1983
King County Courthouse
Seattle, Washington

KATHY BRINKER
Official Court Reporter

THE COURT: Do we have everyone? The Court has found the reference that it wanted to find in the Chemical Bank case and I have reviewed it. Upon reviewing it I don't think it merits the question that I was intending to ask.

The Court will not invite further oral argument with respect to this matter. The motion for reconsideration will be denied. I have concerns with respect to timeliness and I will address the merits.

I am concerned, with respect to timeliness, for several reasons. I appreciate that when the case commenced it was thought that the issue would relate to authority and other issues that were raised. The Supreme Court's decision found that there was not authority, and it is interesting to note that the issues that are now being urged by Chemical Bank were at least suggested in the motion for reconsideration before the Supreme Court, both federal and state constitutional grounds were urged. This was not accompanied with detailed argument or citation of authority. It certainly was not as detailed as it is now, in front of this Court, on the motion for reconsideration, but nevertheless the question was raised and squarely put before the Supreme Court. They chose not to invite further argument. They chose not to address those particular issues in denying the motion for reconsideration; in effect the Supreme Court was indicating, insofar as this issue was concerned, the matter was over.

Now, there have been proceedings in this Court following that decision in which this Court was required to interpret its language and enter certain orders. As I indicated at that time I felt that virtually everything that this Court said with respect to those issues was directly controlled by and compelled by the Supreme Court decision in *Chemical Bank versus the Supply System, et al.* I still feel that way.

I think there are several problems with respect to the constitutional issues that are being advanced, and I think there are several problems with the arguments that the ultra vires doctrine and these particular issues can be reconciled so that they are in harmony and not in conflict. It's important to consider again the nature of the arrangement in this case. The bondholders advanced funds and those funds were advanced to the Supply System. The Supply System was obligated to repay

those funds with interest and they are still obligated to repay those funds with interest.

The difficulty, of course, it that the Supply System, insofar as Projects 4 and 5 is concerned, is now insolvent. They do not have any funds to pay this obligation, but the obligation between the bondholders at all times was an obligation between the Supply System and the bondholders. The bondholders were indeed examining security and were indeed giving consideration to how the Supply System would receive its funds. Every one was of the view hopefully that the funds would be received through the generation of electricity and payments thereon.

But in any event, what we have here is the Supply System obligated, we have a separate third-party agreement, the Participants' Agreement that talks in terms of obligations between the participants and the Supply System. It is those agreements that the Supreme Court found to be ultra vires as exceeding the powers of the Washington municipalities and PUD's. Based upon that, further arguments were heard and the Court ruled that that decision inevitably led to the conclusion that the Participants' Agreement in its entirety was unenforceable for several grounds. Failure to fulfill a conditions precedent to the obligation to the participants to perform; mistake of facts; frustration of purpose which existed from the beginning so as to create a situation where no duty to perform ever arose.

I'm reluctant to discuss in any more detail than has already been discussed the concept of risk, but I think it's inevitable that the Court give some attention to that. Obviously when a party advances funds and is looking to a third party to provide a guarantee or to be the security, one has to give consideration as to whether or not that security instrument is valid. In this instance it was determined that that security was not valid, so what has happened is that the bondholders are in a position where they can only look to the Supply System. It was the Supply System to which they forwarded the funds. The Supply System unfortunately at this stage is not in a position to repay that obligation.

Now, when we look to the obligation of the participant utilities we find that that obligation has been discharged, and it

has been discharged because of the Supreme Court's decision finding some 70 percent of the utilities to have been without authority to enter into the undertaking in the first instance.

I acknowledged the difficult problem with restitution when the matter was before the Court in the motions for entry of judgment, motions for summary judgment. If there was an existing fund then that could be returned, if the Supply System was in possession of the funds that had been advanced by the bondholders, the bondholders would have a claim to those funds. Had the participants received funds or the substantial equivalent of funds, restitution might well be available from them. However, the only way the Court could require participants to pay anything at this stage would be to in effect require them to enforce the agreement. The agreement has been found to be unenforceable.

I don't believe the constitutional principles are applicable here. In the first place it's virtually conceded that the contract law is not implicated. Judicial decisions do not have the effect of impairing the obligations of contracts. Even if we were to assume that the Supreme Court provided a new or different interpretation to the statutes in question, that would not suffice because of the principle of law that indicates that when a court construes a statute, even in situations where the construction is altered, it is as if the statute always so provided.

Beyond that, as the participants have argued in their briefs, parties entering into a contract do so subject to current law. Now, indeed, this reasoning is difficult for a number of people; it's difficult for the Court. The Court obviously viewed the question of authority differently than the Supreme Court has viewed it; the Court is not necessarily persuaded that its view was incorrect. The fact of the matter is that the Supreme Court has made a decision, we're all bound by it, and we must make decisions consistent with that decision, whether we're in agreement with its rationale or not.

Again, if one reads the Chemical Bank decision one can see what the Court is saying with respect to the effect of enforcing the agreement. Basically indicating that the agreement cannot be enforced as against the various utilities and their ratepayers. To in effect now say that they are required to make these payments on the arguments that are being offered

by Chemical Bank is simply to enforce the contract through a different avenue.

Now, the Court has specifically indicated that there may be other theories. There may be tort theories, and if I understand correctly those are being litigated in another form. That is an entirely different matter, and the Court has not passed upon those issues, but that is not before the Court. What the Court is passing upon here is the question of enforcing the contract, and Chemical Bank in effect is asking the Court, notwithstanding the Supreme Court decision, to find some means of enforcing the contracts on a contractual theory or on a restitution theory, that pursuant to the contract sums were advanced and now those sums should be returned. There is not a taking here. There is not governmental action that results in a taking; therefore that particular principle to the Court does not appear to be applicable.

Again the parties entered into an arrangement. The bondholders invested money, they did that directly with the Supply System. The various agreements that the Supply System entered into in terms of ensuring their ability to pay have been found to be invalid. That is the risk I think under these circumstances the bondholders were taking, and unfortunately things did not work out the way everyone contemplated that they would.

For the various reasons indicated, I do not believe this Court can at this time grant the relief Chemical Bank is seeking, and I think relief of this nature would require some provision, modification or alteration of the Supreme Court decision. And those are issues that must be addressed to the State Supreme Court and/or the federal judiciary, if this case reached the federal judiciary at some point in time.

For the reasons indicated the motion to vacate judgment, the motion to reconsider the order previously entered will be denied.

APPENDIX D

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,
Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,
Defendants.

No. 82-2-06840-3

Order and Judgment

On June 15, 1983 the Washington Supreme Court filed an Opinion on discretionary review of certain orders entered by this court on November 16, 1982 and January 4, 1983. Plaintiff Chemical Bank ("Chemical") and defendant Washington Public Power Supply System ("WPPSS") thereafter filed a motion for reconsideration. On July 22, 1983 the Washington Supreme Court entered its Order Denying Motion For Reconsideration and issued its Mandate directing this court to proceed in accordance with the June 15, 1983 Opinion.

Following the announcement of the Washington Supreme Court's Opinion on June 15, 1983, the various defendants listed in Exhibit A attached hereto (hereinafter called the "moving defendants") filed motions in this court for summary judgment or entry of judgment or filed joinders in such motions.

Oral argument on the motions was heard before the undersigned judge of this court on August 8, 1983. All parties and their counsel were given an opportunity to present their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions on August 9, 1983. For the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable;

2. Inasmuch as the Participants' Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the "Bond Resolution"), to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS in connection with the Projects;

4. The defenses, arguments, objections and contentions raised by Chemical and WPPSS in opposition to the aforesaid motions for summary judgment or entry of judgment, including but not limited to any defenses, arguments, objections or contentions relating to estoppel, waiver, laches, ratification, restitution, unjust enrichment,

Article 8 of the Uniform Commercial Code or alleged control by participants of affairs relating to the Projects, are hereby rejected and overruled for the reasons stated in the court's oral opinion;

5. Chemical's complaint for declaratory relief is dismissed, with prejudice, and the moving defendants are to be awarded their taxable costs against Chemical and WPPSS; and

6. There is no just reason for delay in entering this Order And Judgment, which is hereby expressly directed to be entered pursuant to CR 54(b).

DONE IN OPEN COURT this 11th day of August, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia Defendants

Approved as to form:

BETTS, PATTERSON & MINES

By /s/ MICHAEL MINES by JPS

Michael Mines
Attorneys for Chemical Bank

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & O'HERN

By /s/ ALBERT R. MALANCA

Albert R. Malanca
Attorneys for Washington Public
Utility Group

EXHIBIT A

Columbia Defendants:

Columbia Rural Electric Association, Inc.
Blachly-Lane County Cooperative Electric Association
Central Electric Cooperative, Inc.
Columbia Basin Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative, Inc.
Hood River Electric Cooperative
Lane Electric Cooperative, Inc.
Midstate Electric Cooperative, Inc.
Salem Electric
Umatilla Electric Cooperative Association
Wasco Electric Cooperative, Inc.
Kootenai Electric Cooperative, Inc.
Fall River Rural Electric Cooperative, Inc.
Lost River Electric Cooperative, Inc.
Raft River Rural Electric Cooperative, Inc.

21 Defendants:

City of Bandon
City of Bonners Ferry
City of Burley
Clearwater Power Company
Elmhurst Mutual Power & Light
Glacier Electric Cooperative
City of Heyburn
Idaho County Light & Power
City of Idaho Falls
Northern Lights, Inc.
Ohop Mutual Light
Okanogan County Electric Cooperative
Parkland Light & Water Co.
Prairie Power Cooperative
City of Rupert
Rural Electric Association

Unity Light & Power
Wells Rural Electric
City of Centralia, Washington
City of Port Angeles, Washington
Town of McCleary, Washington

9 Defendants:

Big Bend Electric Cooperative, Inc.
City of Milton-Freewater, Oregon
Lincoln Electric Cooperative, Inc.
Missoula Electric Cooperative, Inc.
Ravalli County Electric Cooperative, Inc.
Salmon River Electric Cooperative, Inc.
Tanner Electric Cooperative
Vera Irrigation District No. 15
Vigilante Electric Cooperative, Inc.

Oregon PUDS:

Central Lincoln People's Utility District
Clatskanie People's Utility District
Northern Wasco County People's Utility District
Tillamook People's Utility District

Washington Public Utilities Group:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor County
Public Utility District No. 1 of Lewis County
Public Utility District No. 1 of Mason County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Tacoma, Washington

Others:

Benton Rural Electric Association
City of Springfield
City of McMinnville
Lower Valley Power & Light, Inc.

City of Canby, Oregon (Canby Electric Board)
City of Cascade Locks, Oregon
City of Drain, Oregon
Orcas Power and Light Company
Alder Mutual Light Company
Nespelem Valley Electric Cooperative, Inc.
Town of Steilacoom, Washington
Public Utility District No. 1 of Franklin County
City of Blaine, Washington
Public Utility District No. 1 of Klickitat County
City of Sumas, Washington
Public Utility District No. 1 of Clallam County
City of Ellensburg, Washington
Public Utility District No. 1 of Wahkiakum County
Public Utility District No. 1 of Pend Oreille County
City of Richland, Washington
Public Utility District No. 1 of Chelan County
Public Utility District No. 1 of Grant County
Public Utility District No. 1 of Snohomish County
Public Utility District No. 1 of Douglas County
Inland Power & Light Company

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation, *Plaintiff,* *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al., *Defendants.*	No. 82-2-06840-3 Appendix to Order and Judgment

The court has considered the following pleadings, papers and materials in reaching its Order And Judgment of even date herewith:

	Name of Document	Date
1.	NOTE FOR MOTION DOCKET FOR MOTION TO LIFT THE RESTRAINING ORDER	6/22/83
2.	CHEMICAL BANK'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT THE STAY	6/22/83
3.	NOTE FOR MOTION DOCKET FOR MOTION FOR SUMMARY JUDGMENT BY DEFENDANT CITIES OF CENTRALIA, PORT ANGELES AND TOWN OF MCCLEARY	6/24/83
4.	NOTICE OF MOTION FOR ENTRY OF JUDGMENT.	6/30/83
5.	WASHINGTON PUBLIC UTILITIES GROUP'S MOTION FOR ENTRY OF JUDGMENT DISMISSING ALL CLAIMS AGAINST THE GROUP'S MEMBERS	6/30/93
6.	MEMORANDUM OF WASHINGTON PUBLIC UTILITIES GROUP: (1) IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT DISMISSING CLAIMS; (2) IN SUPPORT OF MOTION FOR ORDER AUTHORIZING WITHDRAWAL OF ESCROW FUNDS; AND (3) IN RESPONSE TO CHEMICAL BANK'S MOTION TO LIFT ORDER RESTRAINING DECLARATION OF DEFAULT	6/30/83

	Name of Document	Date
7.	CHEMICAL BANK'S OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS FOR ORDER ALLOWING WITHDRAWAL OF FUNDS FROM ESCROW ACCOUNT	6/30/83
8.	OPPOSITION OF SUPPLY SYSTEM TO MOTIONS (1) TO WITHDRAW MONEY FROM THE ESCROW FUND, (2) FOR ENTRY OF FINAL SUMMARY JUDGMENT, AND (3) TO LIFT THE RESTRAINING ORDER	6/30/83
9.	JOINDER BY LOWER VALLEY POWER AND LIGHT, INC. IN MOTIONS FOR SUMMARY JUDGMENT	7/11/83
10.	COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
11.	COLUMBIA DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	7/11/83
12.	APPENDIX TO COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
13.	JOINDER BY BENTON RURAL ELECTRIC ASSOCIATION IN COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
14.	NINE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
15.	MEMORANDUM OF NINE DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	7/11/83
16.	AFFIDAVIT OF WILBUR L. ANDERSON	7/11/83
17.	AFFIDAVIT OF JOSEPH W. CUSTER IN SUPPORT OF MOTION	7/11/83
19.	AFFIDAVIT OF LARRY GORDON	7/11/83
20.	AFFIDAVIT OF SALMON RIVER ELECTRIC COOPERATIVE, INC. IN SUPPORT OF MOTION TO DISMISS (TED C. SPRINGER)	7/11/83
21.	AFFIDAVIT OF GARY D. MASON	7/11/83
22.	AFFIDAVIT OF DANIEL B. BAILEY	7/11/83
23.	SUPPLEMENTAL AFFIDAVIT OF HERB SAAGER	7/11/83
24.	AFFIDAVIT OF MELVIN M. LYON	7/11/83
25.	AFFIDAVIT OF HERB SAAGER	7/11/83

	Name of Document	Date
26.	AFFIDAVIT OF BOYD RESSEL, MANAGER OF LINCOLN ELECTRIC COOPERATIVE, INC., DAVENPORT, WASHINGTON,.....	7/11/83
27.	AFFIDAVIT OF KENNETH D. CARPENTER ON BEHALF OF BIG BEND ELECTRIC COOPERATIVE, INC., RITZVILLE, WASHINGTON	7/11/83
28.	AFFIDAVIT OF BYRON WAGNER.....	7/11/83
29.	AFFIDAVIT OF MICHAEL F. SCHUMACHER	7/11/83
30.	MOTION OF EIGHTEEN DEFENDANTS LISTED ON ATTACHED EXHIBIT A FOR SUMMARY JUDGMENT.....	7/11/83
31.	MEMORANDUM IN SUPPORT OF MOTION OF 18 DEFENDANTS FOR SUMMARY JUDGMENT.....	7/11/83
32.	AFFIDAVIT OF JOHN D. LOWERY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	7/11/83
33.	AFFIDAVIT OF JOHN L. JONES ON BEHALF OF DEFENDANT UNITY LIGHT & POWER COMPANY.....	7/11/83
34.	AFFIDAVIT OF JOHN BROG ON BEHALF OF DEFENDANT RURAL ELECTRIC COMPANY.....	7/11/83
35.	AFFIDAVIT OF EDGAR A. OBENCHAIN, JR. ON BEHALF OF DEFENDANT PRAIRIE POWER COOPERATIVE INCORPORATED	7/11/83
36.	AFFIDAVIT OF LYLE N. WALKER ON BEHALF OF DEFENDANT OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC.	7/11/83
37.	AFFIDAVIT OF CURTIS L. KRONES ON BEHALF OF DEFENDANT OHOP MUTUAL LIGHT COMPANY.....	7/11/83
38.	AFFIDAVIT OF ARTHUR L. JASMAN, ON BEHALF OF DEFENDANT NORTHERN LIGHTS.....	7/11/83
39.	AFFIDAVIT OF G. S. HARRISON ON BEHALF OF DEFENDANT CITY OF IDAHO FALLS	7/11/83
40.	AFFIDAVIT OF DONALD R. MANNING ON BEHALF OF DEFENDANT IDA COUNTY LIGHT & POWER COOPERATIVE ASSOCIATION, INC.	7/11/83
41.	AFFIDAVIT OF NEIL H. NERMYR ON BEHALF OF DEFENDANT, GLACIER ELECTRIC COOPERATIVE, INC.	7/11/83

	Name of Document	Date
42.	AFFIDAVIT OF FRANZ HOLMES ON BEHALF OF DEFENDANT ELMHURST MUTUAL POWER & LIGHT	7/11/83
43.	AFFIDAVIT IN BEHALF OF DEFENDANT CLEARWATER POWER COMPANY	7/11/83
44.	AFFIDAVIT OF CHUCK SHADDUCK ON BEHALF OF DEFENDANT CITY OF BURLEY, IDAHO	7/11/83
45.	AFFIDAVIT OF PETER B. WILSON ON BEHALF OF DEFENDANT CITY OF BONNERS FERRY, IDAHO	7/11/83
46.	AFFIDAVIT OF HAROLD SIMS ON BEHALF OF DEFENDANT CITY OF BONNERS FERRY, IDAHO	7/11/83
47.	AFFIDAVIT OF DONALD L. GODDARD ON BEHALF OF DEFENDANT CITY OF BANDON	7/11/83
48.	AFFIDAVIT OF THOMAS W. BURT	7/11/83
49.	AFFIDAVIT OF THOMAS G. HAMERLINCK IN SUPPORT OF 18 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
50.	JOINDER OF ORCAS POWER AND LIGHT COMPANY IN MOTIONS FOR SUMMARY JUDGMENT	7/11/83
51.	NOTICE OF MOTION FOR SUMMARY JUDGMENT OF CITIES OF SPRINGFIELD AND MCMINNVILLE	7/13/83
52.	MOTION FOR SUMMARY JUDGMENT OF CITIES OF SPRINGFIELD AND MCMINNVILLE	7/13/83
53.	BENTON RURAL ELECTRIC ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT AND JOINING IN THE OTHER DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT	7/14/83
54.	JOINDER BY THE CANBY ELECTRIC BOARD AND CITIES OF CASCADE LOCKS AND DRAIN OREGON, IN DEFENDANT PARTICIPANTS' MOTIONS FOR SUMMARY JUDGMENT	7/14/83
55.	ALDER MUTUAL LIGHT COMPANY'S MOTION FOR SUMMARY JUDGMENT	7/15/83
56.	NOTICE OF MOTION FOR SUMMARY JUDGMENT.	7/15/83
57.	AFFIDAVIT OF JOE SANDER ON BEHALF OF ALDER MUTUAL LIGHT COMPANY	7/15/83

	Name of Document	Date
58.	SUPPLY SYSTEM RESPONSE TO CHEMICAL BANK'S MOTION TO LIFT RESTRAINING ORDER	7/22/83
59.	CHEMICAL BANK'S FIRST INTERROGATORIES TO WPPSS	7/22/83
60.	MOTION OF NESPELEM VALLEY ELECTRIC COOPERATIVE, INC. FOR SUMMARY JUDGMENT	7/25/83
61.	NOTICE OF MOTION FOR SUMMARY JUDGMENT.	7/25/83
62.	AFFIDAVIT OF LELAND A. WILLIAMS ON BEHALF OF NESPELEM VALLEY ELECTRIC COOPERATIVE, INC.	7/25/83
63.	MEMORANDUM IN SUPPORT OF NESPELEM VALLEY ELECTRIC COOPERATIVE, INC.'S MOTION FOR SUMMARY JUDGMENT	7/25/83
64.	AMENDED NOTE FOR MOTION DOCKET (SUMMARY JUDGMENT MOTION OF DEFENDANTS CITY OF CENTRALIA, CITY OF PORT ANGELES AND TOWN OF MCCLEARY	7/27/83
65.	MEMORANDUM OF CHEMICAL BANK AND THE SUPPLY SYSTEM IN OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT	7/27/83
66.	NOTICE OF PRESENTATION OF ORDER FOR ENTRY OF JUDGMENT DISMISSING ALL CLAIMS AGAINST WASHINGTON PUBLIC UTILITIES GROUP	7/27/83
67.	MOTION FOR ENTRY OF JUDGMENT DISMISSING ALL CLAIMS (SNOHOMISH COUNTY PUD)	7/29/83
68.	NOTICE OF MOTION	7/29/83
69.	COLUMBIA DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	8/3/83
70.	MEMORANDUM OF CHEMICAL BANK IN OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS FOR ENTRY OF JUDGMENT	8/3/83
71.	AFFIDAVIT OF JOHN D. LOWERY IN SUPPORT OF EIGHTEEN DEFENDANTS' REPLY TO MEMORANDUM OF CHEMICAL BANK AND THE SUPPLY SYSTEM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	8/3/83

	Name of Document	Date
72.	AFFIDAVIT OF D. VERNON DALTON ON BEHALF OF DEFENDANT WELLS RURAL ELECTRIC COMPANY	8/3/83
73.	REPLY OF 18 DEFENDANTS (SEE ATTACHED EXHIBIT A) TO MEMORANDUM OF CHEMICAL BANK AND THE SUPPLY SYSTEM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	8/3/83
74.	REPLY MEMORANDUM OF NINE DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	8/3/83
75.	AFFIDAVIT OF JOHN CURTIS ON BEHALF OF DEFENDANT PARKLAND LIGHT & WATER COMPANY	8/3/83
76.	JOINDER OF DEFENDANT CITIES OF SPRINGFIELD AND MCMINNVILLE IN MOTIONS FOR SUMMARY JUDGMENT	8/4/83
77.	RESPONSE OF WASHINGTON PUBLIC UTILITIES GROUP TO MEMORANDUM OF CHEMICAL BANK IN OPPOSITION TO CERTAIN DEFENDANTS' MOTIONS FOR ENTRY OF JUDGMENT	8/4/83
78.	NINE DEFENDANTS' REPLY SUPPORTING ENTRY OF JUDGMENT AND OPPOSING REQUEST FOR STAY	8/5/83
79.	COLUMBIA DEFENDANTS REPLY TO CHEMICAL BANK'S MEMO IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION FOR ENTRY OF JUDGMENT	8/5/83
80.	AFFIDAVIT OF FREDERICK D. HUEBNER	8/5/83
81.	ADDITIONAL AFFIDAVIT OF JOHN D. LOWERY IN SUPPORT OF MOTION OF 18 DEFENDANTS (SEE ATTACHED EXHIBIT A) FOR SUMMARY JUDGMENT	8/5/83
82.	MEMORANDUM OF 21 DEFENDANTS (SEE ATTACHED EXHIBIT A) IN REPLY TO MEMORANDUM IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	8/5/83
83.	OREGON PUDS' JOINDER IN MOTION FOR SUMMARY JUDGMENT	8/5/83

Name of Document	Date
84. MEMORANDUM OF CHEMICAL BANK IN RESPONSE TO PURPORTED GROUNDS FOR SUMMARY JUDGMENT AND ENTRY OF JUDGMENT NEWLY RAISED BY DEFENDANTS	8/8/83
85. MEMORANDUM OF RICHLAND, GRANT AND CHELAN IN SUPPORT OF MOTION OF WASHINGTON MUNICIPAL PARTICIPANTS FOR ENTRY OF JUDGMENT	8/8/83
86. COLUMBIA DEFENDANTS' MEMORANDUM REGARDING FORM OF ORDER AND JUDGMENT	8/11/83

In addition, in reaching said Order And Judgment the court has previously read and considered the pleadings, papers and materials listed in (1) the Appendix to Order on Motions for Summary Judgment, dated November 16, 1982, and (2) the Order Approving Appendix And Supplement To Appendix To First Supplemental Order On Motions For Summary Judgment, dated May 4, 1983, and the Appendix and Supplement to Appendix approved and incorporated therein.

DONE IN OPEN COURT this 11th day of August, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia
Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK OF NEW YORK,

Plaintiff,

VS.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Defendants.

No. 82-2-06840

ORAL DECISION

BY

THE HONORABLE JOSEPH COLEMAN

9:00 a.m.

August 9, 1983

King County Courthouse

Seattle, Washington

KATHY BRINKER
Official Court Reporter

APPEARANCES

FOR CHEMICAL BANK:	MICHAEL MINES Attorney at Law 4000 Bank of California Center Seattle, Washington 98164
FOR WPPSS SUPPLY SYSTEM:	RICHARD C. YARMUTH EARL HEREFORD Attorneys at Law 27th Floor, One Union Square Seattle, Washington 98101
FOR COLUMBIA DEFENDANTS:	DAVID JURCA Attorney at Law 1500 Washington Building Seattle, Washington 98101
FOR 22 DEFENDANTS:	JOHN D. LOWRY Attorney at Law 4400 Sea-First Building Seattle, Washington 98154
FOR CITY OF RICHLAND:	GEORGE M. MACK Attorney at Law 4100 Sea-First Building Seattle, Washington 98154
FOR WASHINGTON PUBLIC UTILITIES GROUP:	ALBERT R. MALANCA Attorney at Law 2200 First Interstate Plaza Tacoma, Washington 98402
FOR OREGON UTILITIES:	LARRY GANGNES Attorney at Law 3800 Rainier Bank Tower Seattle, Washington 98101
FOR BERT METZGER:	WILLIAM BENDER Attorney at Law 1111 Third Avenue, Suite 1500 Seattle, Washington 98101

PROCEEDINGS

THE COURT: Good morning. Please be seated. Anyone have any final dispositive thoughts this morning?

The Court has reviewed your briefs, the affidavits that have been attached in support of the memoranda. The Court has considered the agruments that have been observed in support of your respective positions.

The first issue the Court will address is entry of judgment with respect to the Washington PUD's and municipalities. In view of the decision of the Supreme Court, the Washington cities, PUD districts are entitled to entry of judgment.

The Supreme Court has held that the Washington municipalities and districts lack the statutory authority to enter into the Participants' Agreement. That being so, the contract is ultra vires as to them and may not be enforced.

The doctrines of waiver, latches [sic] and estoppel are inapplicable in this context. Those defenses may not be raised in such a fashion as to permit enforcement of an ultra vires contract. The reasons for that are apparent. A court in finding a contract to be ultra vires is not excusing performance on behalf of the promisor in order to award the promisor in any way; in fact, courts are usually distressed if municipalities and districts do in fact exceed their authorities. What the Court is saying is that the agreement may not be enforced in order to protect the citizens of that district or that municipality. They require that type of protection; therefore if the municipal agency has exceeded its authority that contract may not be enforced. And if you think of it in that light the reasons seem to the Court to be more apparent.

The Court's decision in this regard is a limited decision. Whether there are other theories available, such as tortuous or negligent misrepresentation of authority, fraud, misrepresentation, or other issues is beyond the province of this Court. This Court's decision is based upon a ruling that the Washington municipalities and districts lacked authority, lacked statutory authority; therefore the contract is ultra vires, and an ultra vires contract may not be enforced as such. For that reason the Court will enter an order accordingly.

Chemical Bank has asked the Court to stay entry of such a judgment. The Court declines to do so. The matter has been here now for a period of a year. There has been extensive litigation. The time has come for the Court, based upon the Supreme Court's mandate to enter this order.

Likewise the Court would not have the authority to grant a trial on the issue of control. The Court can appreciate Chemical Bank's position in that regard; however, the Supreme Court again very specifically has ruled that the Participants' Agreement did not provide significant control so as to provide the equivalent of an ownership interest. The Supreme Court was specifically asked to review that aspect of their opinion in the motion for reconsideration. In fact, they were specifically asked to remand the matter to the trial court for purposes of an evidentiary hearing. They chose not to do so.

Likewise, in the motion for reconsideration, it was urged that there had been legislative ratification, that there were statutes that had not been considered by the Supreme Court. Again, by virtue of the denial of the motion for reconsideration, it is apparent that the Court rejected that motion or at a very minimum it's apparent that this Court does not have the ability to entertain a consideration of any other statutes.

Newly discovered evidence or newly discovered law normally is insufficient to permit a court to reopen a matter, and it certainly is insufficient to allow a trial court to reopen a matter after the mandate is issued.

It's apparent that this case will be before the Supreme Court again. We'll have a Chemical Bank II case, and it would be so regardless of how the Court would resolve these issues. And it may be that the Court will want to look at these issues, and there may be some modification or revision, but that is entirely beyond the scope of the trial court, left exclusively to the judgment of the Supreme Court. And obviously if the Supreme Court's final opinion in any way alters or changes any of these factors then the trial court may be involved in further proceedings but at this stage it's apparent, given the mandate and the language of what the Supreme Court has said, that judgment must be entered.

The remaining issue is whether the contract is enforceable with respect to the remaining participants, specifically, in this

context, the cooperatives. The Court is of the view that the contracts cannot be enforced as to the cooperatives and remaining participants, and for that reason judgment will be entered in their favor also.

There are three principles that need to be discussed in this regard. There is the contract interpretation question; there is the defense of mutual mistake of fact; there is also the argument relating to frustration or impracticability concerning the purposes for which the contract was entered into.

Beyond that, two additional grounds have been urged, that of public policy and unconscionability. The latter issues I will address. I do not intend in this opinion to rule on those issues definitively inasmuch as I do not believe that the Court needs to reach those issues, and there are other reasons why I'm reluctant to rule upon them. I will explain that to you when we arrive at that point.

As far as the contract is concerned, I would make the following observations: If it is read, and I have observed on numerous occasions that the contract must be read in its entirety, read in its entirety, the parties simply did not contemplate this situation. In theory, a contract of this nature may be divisible so as to have independent performances but written in the manner that it was written that is not possible in this context.

Now, I'll begin with Section 3 of the contract, the section that has language to the effect that the agreement shall become effectively only upon execution and delivery. I've viewed that from a number of perspectives. I've viewed it from the perspective of a condition that simply marks time; in other words, identifies a point in time in which performance is to begin. The court isn't able to accept that instruction in the context of this case, given the affidavits that have been filed.

I considered it from the perspective of a condition that was inserted solely for the benefit of the Supply System, in other words, a provision that indicates to the Supply System you need not begin your performance until the happening of these events, and when these events happen then you may begin your performance. Again, given the affidavits that are before the Court which have not been controverted, that is a construction that is not available to the Court.

I have not given Section 3 the construction that some have urged, and that is a construction that would indicate that the contract never came into existence. I've given it the construction that without one hundred percent participation, or at least a substantial participation, the promisor, in this instance the participants, do not have a duty to perform.

The courts will normally try to avoid a construction that indicates that an agreement never came into being. They will normally avoid that in favor of a construction that indicates that there is a condition that must be fulfilled before there is a duty to perform. That is the construction I have given the section in this instance.

I do not believe this to be inconsistent with the previous ruling of the Court. In some senses the matter that was before the Court before should have been resolved on the basis that it was premature. We had a substantially different situation at that time. There was an Oregon trial court ruling affecting approximately 8 percent of the participants. It was not at that time and there is not to this date a decision from any of the Idaho courts, other than to simply stay enforcement or payment. And insofar as Oregon is concerned at that time, and the situation is still the same today, the Oregon Supreme Court has not ruled.

The restatement takes the position in Section 229 that conditions under certain circumstances may be excused. The specific section reads: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, the Court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." If we were dealing with 8 percent or 5 percent or even a greater percent, the Court might well take the position that the particular condition had been excused, that a failure on the part of some small percentage to be able to perform would not constitute such a material breach of the basic purposes for which the agreement was entered into, that a court would be justified in applying the condition so as to bar performance. But we don't have that situation here. We have a minimum of 70 percent of the participants who are no longer participants by virtue of the fact that they lack the statutory authority to enter into this agreement. That being so, the Court reaches the conclusion that it does.

Now, concerning the contract itself, it is true that courts can and do, under certain circumstances, supply missing terms or revise contracts, but not to the extent that would be required here. If a court revises and, in effect, reforms a contract to accord with the intent of the parties, what the Court is basically saying is that this is what these parties intended to do or this is what these parties would have done had these conditions been known to them.

I think it's abundantly clear on this record that had the parties been aware that 70 percent of participants lacked authority, they wouldn't have entered the agreement in the first instance. The agreement wouldn't have been revised to meet this contingency. The agreement simply wouldn't have been executed.

Additionally, it's important to note that the parties could have drafted to meet this contingency had they chosen to do so, and they did not do so. One of the parties in offering oral argument has indicated that as a result of the Supreme Court decision you have very little left. The very heart of the agreement ceases to exist. There are important parts of the agreed exchange that simply didn't come about. There are difficulties now with the annual budget. The annual budget is to be prepared and proposed to a Participants' Committee.

The agreement, if read properly, indicates that there is not a Participants' Committee at this stage. There has to be a quorum of 50 percent of participants' shares. The agreement really doesn't contemplate a situation where you no longer have participants. The agreement contemplates you will have all the participants. You will have 100 percent participation. There are no provisions in the agreement for simply removing some participants and then proceeding with the remainder.

Even if you take a different view than this Court took with respect to a step-up, you have the same situation. Step-up itself was limited to 25 percent of a participant's share, and even if you utilize those provisions you still fall short. And the drafters of the agreement apparently never contemplated that this would happen; therefore they made no provisions for this situation.

Now, I adhere to the position that I took concerning step-up. That has not formally been placed before the Supreme

Court, if the Court understands the record correctly, although it is important to note that the Supreme Court on its own initiative at least suggested that it has reached a different conclusion. That is probably without the benefit of briefing or argument, but if you read the opinion, the Court indicates that another vice that they see is that the participants, without any meaningful control, could be asked to pay up to a certain point the obligations of other participants based upon a finding that those participants did not have authority. Whether that would remain their position after the matter is argued again or not remains to be seen. But regardless of how you resolve that, that wouldn't change this opinion. In other words, this Court could reason its opinion with step-up being applicable or without step-up being applicable. I would repeat again, the basic reasons for the Court's ruling in that regard is based upon the contract language that indicated that if a party failed to perform its obligations, then others could be called upon to fulfill those obligations.

The Court ruled for two reasons that the step-up is not applicable. Number one, that if one is not a participant by virtue of lack of authority, there is no obligation; and secondly, and even more importantly, all of the default provisions contemplate a remedy. It's contemplated that a participant as well as the system will always have a remedy against a defaulting participant, and remedies, at least in the contractual sense, are unavailable if you are faced with an ultra vires contract. So it was for that reason that the Court did not believe that there was a step-up. But even if you take the position that there is a step-up, it doesn't change the nature of this situation. In fact, in some senses it strengthens the position urged by participants.

Well, I've made reference to the annual budget and the fact that there is not a Participants' Committee that the annual budget can be submitted to. Therefore, whatever control or role participants had under the provisions of the agreement is not available to them at this time. Again, another important part of the bargain was involvement in the termination process if the termination process came about. That is no longer possible in view of the fact that 70 percent of the participants do not have obligations under the agreement.

There are other problems, and that is the fact that the agreement is to remain in effect till all principal and interest on the bonds has been paid. That now is an impossibility. The agreement at this state has—there is no way that it can end insofar as the remaining participants are concerned. Mr. Schumacher has identified a number of other areas that would no longer be possible under this agreement having to do with involvement in the termination process, accounting with respect to assets.

The very fact that default has occurred is a problem in this regard. The termination did not occur by virtue of anyone lacking authority. Termination occurred based upon a finding that it was not possible to continue to finance the projects. However, default is a direct consequence of 70 percent of the participants lacking authority. But for that absence of authority default would have been avoided or could have been avoided.

Now, it may have been that the restraining order would have had to have remained in effect for a longer period of time, but nevertheless default would not have been an inevitability. Default alone changes the nature of what the parties have.

The fact that Chemical Bank at this time, pursuant to the bond resolution, can seize assets, can take over management of the projects, materially alters the position that the remaining participants find themselves in. For all of these reasons it appears to the Court this contract cannot be enforced, given the Supreme Court ruling.

There are other areas that the Court will address, one of which is that there has been a mutual mistake fact that would entitle the parties to recision. Section 152 of the restatement treats the law in existence at the time of making a contract as part of a total state of facts existing at that time. That principle I think is consistent with Washington cases. It's closely related to the Washington cases that indicate that antecedent facts and antecedent duties and rights and obligations fall within the scope of this doctrine, whereas if you sign an agreement and misunderstand the nature and consequences of that act, that does not fall within the doctrine. But the Court believes that the existence or non-existence of authority at the time of entering the contract is essentially a factual matter, and that therefore this doctrine is applicable.

Insofar as mistake is concerned, it must relate to a basic assumption on which the contract was made, and in this context the mistake that was made definitely relates to a basic assumption upon which this contract was made. The basic assumption upon which this contract was made was that most, if not all, participants had authority, and certainly the assumption was that the Washington municipalities and PUD's had authority.

The party seeking avoidance must show that the mistake has a material effect upon the agreed exchange of performance. This is the closer issue in this case. The parties bargained for a meaningful role in the overall project. Not only the construction and operation project, but also the termination aspect of the project, if that came about. I've already demonstrated that by virtue of the absence of 70 percent participation, at least 70 percent participation and perhaps more, depending on how the Oregon and Idaho question is solved, there has been a material change in that regard.

The agreed exchange of performance is no longer available in the manner that the parties contemplated. The involvement of the Participants' Committee is only one example of that. The whole approach to the budget-making process, the whole approach to the termination process, is substantially different. This was an important part of the parties' bargain. The mutual mistake has rendered inapplicable many of those provisions. The only way they could be applicable now would be for the Court to perform major surgery on the agreement, and generally the courts do not perform surgery on the guise of either reformation or supplying missing terms.

The final requirement for the doctrine of mutual mistake of facts to apply is that the mistake must not be one to which the party seeking relief bears the risk. Again, as it relates to the Washington PUD's and municipalities, it would not be the Court's conclusion that the individual participants, those that remain, bore the risk. The Supply System certainly took a number of steps to minimize that risk. One step was requiring that counsel for the various entities deliver an unequivocal opinion letter. I think that stands for the proposition that the Supply System was aware of a potential risk and took steps that they believed at the time to be sufficient to isolate and in effect remove that as being the risk, but because that was their

requirement, I think that supports the conclusion that in this context they were aware of the risk.

I think it also supports the conculsion that had the parties thought about the possibility of this situation, they would have drafted the agreement substantially different. This is a situation where the Supply System, through counsel, drafted an agreement, and it would not have been difficult to have inserted provisions that would have covered a situation where you would have gone beyond the ability of the step-up to function and where you would have had a situation of this nature. That would not have been at all difficult to have drafted provisions that would have covered this situation.

Now, with respect to the doctrine of mutual mistake of fact, the restatement makes the following observations, simply paraphrased. The restatement points out that it is not enough for a party to prove that he would not have made the contract had it not been for the mistake, he must show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out.

Generally a party must establish that it is less desirable to him and more advantageous to the other parties. In exceptional cases the adversely-affected party may be able to show that the effect on the agreed exchange has been material simply on the ground that the exchange has become less desirable for him, even though there has been no effect on the other party. Such cases normally are more appropriately left to the rules on impracticability and frustration.

I think this latter is applicable here. Clearly this has not resulted in a situation that is more advantageous to the Supply System, but because of the unique nature of the undertaking, the unique nature of the agreement, I think we do have a case where the adversely-affected party is able to show and has shown that the effect on the agreed exchange has been material, simply on the ground that the exchange has become less desirable for him, even though there has been no effect on, in this instance, the Supply System.

It is important to underscore the fact that one does have to demonstrate more than a simple showing that they would not have entered the contract had it not been for the mistake. As is

always the case, in offering arguments, parties generally go several steps beyond what the law permits, and that being so, I would underscore that there is substantially more here than a showing that the parties wouldn't have entered the contract. You have to show that you wouldn't have entered the contract, and then you have to go on and show substantial reasons as to why you would not have entered the contract and basically that is to show that your burden now is materially different or you have not received the benefits of your bargain to a substantial degree. And I think that criteria is satisfied here for the reasons I have indicated, both in the contract analysis and both in the analysis that relates to mutual mistake of fact.

The rules with respect to impracticability apply. In some senses, the application is more direct than it is with mutual mistake of fact, in other senses it is not; but in any event the reasons are parallel. There are three distinct grounds for discharge of an obligor's duty. The first ground is that some circumstances has made his own performance impracticable. I've again discussed this. By virtue of the change, the lack of any type of control now, regardless of how minimal it was, it is no longer available.

The cases talk in terms of foreseeability "did the parties foresee the circumstances, and if they predicted or foresaw the circumstances, did they contract so as to make provisions for it?" Again, the parties in this case I don't believe foresaw that this was going to happen. And if they did foresee that it was going to happen, they certainly didn't take any steps to provide for its handling in the agreement itself.

I think that particular principle has been satisfied in this case. The performance now of the promisor participant, with respect to their payment obligations, has become substantially more burdensome and impracticable, given the different roles that they would be in if they were to continue to perform. They would not have the role that they would have had had the agreement proceeded as was contemplated by all of the parties.

Another independent ground is that there must be some circumstances which has so destroyed the value to him of the other parties' performance as to frustrate his own purpose in making the contract. The reasons that the Court has already identified would be applicable here.

A third independent ground is that a party will not receive the agreed exchange for his own performance because some circumstances has discharged the obligee's duty to render that agreed exchange on the ground of impracticability or frustration. This is not as applicable here, although I have already commented about the role that the Supply System will now play. The role that was contemplated for the Supply System is substantially different because the Supply System is now in default. The Supply System is in default because 70 percent of the participants were without authority to enter into the agreement.

Therefore the types of activities the participants were looking to the Supply System to perform as a part of their agreed exchange has been materially affected because of the fact that the Supply System is now in an entirely different position, they are in default; and while the agreement contemplates default, it didn't contemplate that default would occur for these reasons: It contemplated that there might be a default because of insolvency on the part of some or a willful failure to perform on the part of some. Provisions were entered to take care of this, but not to the extent that we are now faced with.

The restatement, the rationale behind the comments and the restatement are that the obligor's relieved of his duty because the contract having been made on a different basic assumption is regarded as not covering the case that has arisen. Again, I think that is clearly the situation here.

Again, in comparing the doctrine of frustration and the doctrine of mutual mistake of facts, the restatement has the following to say: *Section 266* is the notion of unexpected extreme hardship, either through impracticability of performance or frustration of purpose and the legal consequences that no duty to render performance arises. The restatement draws distinctions between situations that existed at the time the contract was entered into and situations that came about later. In the former instance, the position of the restatement is that no duty ever arose. I think we have that principle to consider in the context of this case.

The notion of allocation of risk plays a much more significant role in connection with the law of mistake than it

does in connection with the law of impracticability and frustration. And with respect to the doctrine of mistake, *Section 152* is the notion of an unexpected material imbalance in the exchange, and the legal consequence is merely one that the contract is avoidable by the party adversely affected.

It's been argued in this case that even if the Court applies the doctrine of mutual mistake of facts or frustration of purpose, or for that matter the rule relating to the nonperformance of a condition, that restitution is required. The difficulty, again, in this case is there isn't any way that a court can order restitution without ordering participants to perform the obligations under the contract. In order for there to be restitution a benefit has to have been conferred. It's very difficult in the context of this case to conclude that a benefit has been conferred. It does not appear to the court to be the type of situation where there is any meaningful or practical way to require restitution. In some cases, where there has been performance under a contract, the Court is able to and does award restitution, either to the party who is seeking to be relieved of its obligation or in appropriate cases to the other party as well. But for the reasons advanced in the briefs and in the arguments, based upon the state of the record, there isn't any way that the Court can award restitution in this instance.

Throughout the course of this case there has been, quite understandably and properly, a great deal of discussion concerning hardships, what parties are or are not innocent. The difficulty with this case is that you have substantially two bodies of people who are relatively innocent. You have ratepayers on the one hand; you have bond holders on the other hand. Certain arguments can be advanced against the innocence of both, but on the whole they are in relatively the same position.

It can be said, of course, that rate payers, through their elected representatives, had control over whether the agreement would ever have been entered into in the first instance. While that may be so in theory, there are certainly practical difficulties in that regard.

Now, insofar as bond holders are concerned, the argument has been advanced that they undertake a risk. To some extent bond holders do undertake a risk. The risk is generally one of assessing the creditworthiness of whatever institution or agency

is issuing a bond or is agreeing to make payments so the bond can be paid. But beyond that there are other risks as well, and that is the assessment of the validity of the instruments in question, be they security instruments or the validity of the issue itself.

So if you weigh and compare you have, to some extent, two groups of people that are in a similar situation, and there is simply no way that the Court in this instance is going to be able to avoid allocating risk in such a fashion that someone is not going to be substantially harmed.

Certainly the Court in October, when it ruled, was cognizant of the effect that this would have on the ratepayers. The Court is cognizant of the effect that this will have on bond holders, but the Court throughout these proceedings, to the extent possible, has tried to view the principles of law without taking into consideration matters of hardship, unless those were proper factors for the Court to weigh.

I have reviewed this case and decided this case, based upon the facts, the affidavits, the facts that have not been rebutted or controverted in any way, and the principles of law as I believe them to be. The Supreme Court will certainly have an opportunity to review this case and reach whatever conclusions it believes to be appropriate.

I am not addressing questions of public policy and unconscionability, even though I asked questions of some of you while that was being argued. It's very difficult for the Court to believe, as it reads the Supreme Court opinion, that the Supreme Court would draw a distinction between a Washington municipality and PUD's and remaining cooperative participants. I make that statement based not only on what the Supreme Court has said, but also in the manner in which they have said it.

Now, I have reviewed this with respect to various legal principles and believe that these principles control the result here. I acknowledge that the Supreme Court, in reviewing the matter, may well undertake an evaluation of public policy considerations. I have not done so for several reasons.

The language in the Supreme Court opinion that makes reference to public policy is in the context of discussing the

statutes that regulate the authority of municipalities and districts, and the language with respect to public policy is in the context of explaining why these statutes are important to those entities. There also is some ambiguity, at least in the record, with respect to whether or not a member of a cooperative would have any meaningful choice. A ratepayer in the City of Seattle and City of Tacoma or Snohomish County essentially has no meaningful choice. They can curtail their use of electricity, they can have their electricity disconnected, but they don't have any other suppliers available to them.

With respect to the cooperatives, the papers before the Court suggest two things. Some of the affidavits suggest that this is precisely the situation that a ratepayer of a cooperative is in, and if that be the case, then there may well be defensible public policy grounds to extend the Supreme Court rulings to cooperatives as well to the gound of public policy.

On the other hand, there are papers before the Court that indicate that some cooperatives are concerned that if the enormous debt, if their share of the enormous debt is to be borne by them that they will lose members to competing suppliers. There is also, if I recall correctly, and there are volumes and volumes of affidavits to be kept in mind, if I recall correctly, I believe that there are papers filed on behalf of some of the Idaho cooperatives indicating there is a means in Idaho where a petitioner may petition a court or body and they may receive electricity from other sources. I think the record is ambiguous in that regard and I'm reluctant to address public policy consideration for that reason.

I'm also reluctant because I believe the Supreme Court discussion was intended to relate only to the principle of law that municipal corporations are subject to control by the legislature, and may exercise only those powers that are expressly granted to them or those powers that are necessarily implied based upon their express grant for power.

Again, the conclusions as to whether there was or was not authority is indeed debatable, but it has been decided and further discussion in that regard is foreclosed. As far as unconscionability is concerned, if you recall in October when the Court ruled, I believe I indicated that I did not believe the agreements were substantively unconscionable for the reason

that such agreements have been sanctioned in other jurisdictions. In reading the Supreme Court opinion I would conclude that if the legislature were to pass a statute or had passed a statute specifically authorizing clauses of this nature, that there would not have—that the authority ruling would not have been as it was, even given all of the other terms that are in the contract. So I am reluctant t reach the issue of whether the agreement is unconscionable. Normally unconscionable agreements are such that they are so one-sided and so harsh that they cannot be enforced, and I think what the Court is saying here is that these agreements are ultra vires, not on that basis but on the basis that there was no authority for them in the first instance, and so I would be reluctant to deal with the question of unconscionability for that reason.

There are additional reasons as well. You always have to look at an agreement, and if the agreement seems to be one-sided or contains harsh terms, you have to look at the context of the agreement. What may be unconscionable in one context is not unconscionable in another, and again it must be borne in mind that this was a gigantic undertaking that was going to involve, at the beginning, every estimate was it was going to involve several billion dollars, and therefore it's not at all peculiar that agreement would be drafted so as to provide an unconditionable obligation to pay, to limit remedies to ensure that there would always be a stream of funds sufficient to make the payments, and it is not at all unusual that the other provisions of the agreement would be inserted when you are facing this kind of a situation. So for those reasons I don't reach those issues, although I think they are debatable, particularly the issues that relate to public policy. That covers the basic reasons that the Court has employed in arriving at this conclusion.

The Court has form orders before it. The parties need to discuss that, and there are some revisions that need to be made in view of the Court's ruling. Additionally the Court has indicated what it intends the scope of this ruling to be, and that is based upon a decision that Washington municipalities and public utilities districts lack statutory authority, the agreement as to them is ultra vires and the agreement may not be enforced. The Court does not intend to go beyond that.

If there are issues pending in other courts that relate to other theories of recovery, aside from the contractual theory the Court has dealt with here, then that is within the province of those courts to decide, not within the province of this Court.

We will be at recess. If you wish to review form orders, and if you feel that those can be settled this morning, we can address that issue. If you feel that they cannot be settled we can set a date in the very near future for that to occur so that these orders may become final and you may begin the appeal process.

We'll be at recess.

(Court Adjourned.)

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,

Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,

Defendants.

No. 82-2-06840-3

Order on Motions for Summary Judgment

Plaintiff Chemical Bank ("Chemical") filed a motion for summary judgment on July 21, 1982. Various defendants moved to strike Chemical's motion or to continue the hearing on the motion. Following hearings on said motions to strike or continue Chemical's motion for summary judgment, on September 7, 1982, the court ordered that (1) the defendants' answering papers were due by September 20, 1982, (2) Chemical's reply papers were due by October 6, 1982, and (3) Chemical's motion would be heard on October 11, 1982.

On September 20, 1982, defendant Washington Public Power Supply System ("WPPSS") formally joined in Chemical's motion for summary judgment. On or about the same date, defendant City of Ellensburg ("Ellensburg"), defendants City of Springfield ("Springfield") and City of McMinnville ("McMinnville"), the so-called "Columbia defendants" and the so-called "22 defendants" filed crossmotions for summary judgment or partial summary judgment, and these and other defendants filed various memoranda and other papers in opposition to Chemical's motion. In addition, defendant City of Richland ("Richland") filed a motion for summary judgment on September 29, 1982, and defendant Vera Irrigation

District No. 15 ("Vera") filed a motion for summary judgment on or about October 6, 1982.

On October 6, 1982, Chemical and WPPSS each filed a reply memorandum in support of Chemical's motion for summary judgment and in opposition to the various defendants' crossmotions for summary judgment or partial summary judgment. In addition, WPPSS filed eleven affidavits in support of Chemical's motion and in opposition to the various other defendants' crossmotions.

Oral argument on the aforesaid motions and crossmotions was heard before the undersigned judge of this court on October 11, 12 and 13, 1982. All parties and their counsel were given an opportunity to present their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix to Order on Motions for Summary Judgment, which Appendix is filed herewith and is by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions and crossmotions on October 15, 1982. Proposed forms of an order were presented to the court at a hearing on November 8, 1982. For the reasons set forth in the court's October 15, 1982, oral decision, which by this reference is incorporated herein, and for the additional reasons announced by the court at the November 8, 1982, hearing on the proposed forms of order, IT IS HEREBY ORDERED as follows:

1. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of the debt service which WPPSS is obligated to pay on the bonds issued pursuant to WPPSS Board of Directors Resolution No. 890 (the "Bond Resolution") and the resolutions supplemental thereto. Such debt service on the bonds includes all principal and interest when due, whether or not any of the projects (WPPSS Nuclear Plants Nos. 4 and 5) has been or ever will be completed or placed into operation.

2. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of decommissioning costs incurred by WPPSS, whether or not any of the projects has been or ever will be completed or placed into operation. Under the terms of the Participants' Agreement, such decommissioning costs (a) are not limited to costs incurred after termination of the projects and (b) are to be included in the Annual Budgets or amended Annual Budgets and are to be paid by the participants pursuant to the annual or amended Billing Statements.

3. As a matter of law, WPPSS had statutory authority to enter into the Participants' Agreement and Bond Resolution and to issue the bonds pursuant thereto.

4. As a matter of law, the Washington participants (other than Vera) had statutory authority to enter into the Participants' Agreement. All Oregon authority issues have been stayed pursuant to an earlier order of this court, and this order has no bearing on the authority of Oregon participants to enter into the Participants' Agreement. The court reserves decision as to whether Vera and the other participants had authority to enter into the Participants' Agreement and will give further consideration to that issue at a later date.

5. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the incurring of debt. Such obligations do not constitute debt within the meaning of such limitations, and even if such limitations were otherwise applicable, they would be rendered inapplicable by reason of the special fund doctrine under Washington law.

6. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the lending of credit.

7. As a matter of law, the Participants' Agreement does not constitute or provide for any unlawful delegations of power or authority by Washington participants.

8. The Interstate Compact Clause of the United States Constitution is not applicable to the Participants' Agreement.

9. In order to give the defendant participants additional time to respond to the affidavits filed by WPPSS on October 6, 1982, the participants have been given until November 12, 1982, in which to file any affidavits or other materials in response to said affidavits filed by WPPSS. The court will hear further oral argument on December 13, 1982, or on such other date as may be fixed by the court, to determine what other issues, if any, can be decided by the court as a matter of law and what fact issues, if any, remain for trial.

10. The aforesaid crossmotions for summary judgment or partial summary judgment filed by Ellensburg, Springfield and McMinnville, the "Columbia defendants" and the "22 defendants" are denied.

11. Although this is an interlocutory order, the court recognizes that this case involves fundamental and urgent issues of broad public import which require prompt and ultimate determination. Accordingly, the court invites any of the parties to seek immediate discretionary review by the Court of Appeals or the Supreme Court of any portion or portions of this order.

DONE IN OPEN COURT this 16 day of November, 1982.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN,
MARTIN, TODD & HOKANSON

By /s/ DAVID F. JURCA
David F. Jurca

By /s/ LINDA J. COCHRAN
Linda J. Cochran

Attorneys for Columbia Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK, a New York corporation
Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,
Defendants.

No. 82-2-06840-3

Appendix to Order on Motions for Summary Judgment

The court has considered the following pleadings, papers and materials in reaching its Order on Motions for Summary Judgment of even date herewith:

	Name of Document	Filing Date	Clerk's Submittal No.
1.	Complaint for Declaratory Relief	5/18/82	1
2.	Chemical Bank's Motion for Summary Judgment	7/21/82	131
3.	Affidavit of Harlan R. Kosmata in Support of Plaintiff's Motion for Summary Judgment	7/21/82	128
4.	Memorandum in Support of Plaintiff's Motion for Summary Judgment	7/21/82	129
5.	Memorandum in Support of Defendant City of Ellensburg's Motion to Strike Plaintiffs' Summary Judgment Motion	8/3/82	175
6.	Motion of Cities of Springfield and McMinnville to Continue Plaintiff's Pending Motion for Summary Judgment	8/3/82	181
7.	Motion for Continuance of Plaintiff's Motion for Summary Judgment	8/2/82	166
8.	Motion and Notice of Hearing of Motion to Strike Plaintiff's Pending Motion for Summary Judgment with attached Affidavit of Margaret A. Pageler	8/2/82	172

Name of Document	Filing Date	Clerk's Submittal No.
9. Notice of and Motion for Continuance	8/3/82	178
10. Affidavit of David F. Jurca in Support of Motion for Continuance	8/3/82	174
11. Memorandum in Support of Motion for Continuance	8/3/82	173
12. Certain Defendants' Answer, Counterclaim and Crossclaims.	8/6/82	1955
13. Memorandum of Oregon PUD's in Support of Motions to Strike Chemical Bank's Pending Motion for Summary Judgment	8/4/82	184
14. Memorandum of City of Milton-Freewater, Salmon River Electric Cooperative, Inc. and Missoula Electric Cooperative, Inc. Re Scheduling of Chemical Bank Motion	8/6/82	205
15. Motion for Reconsideration by 22 Defendants	8/16/82	246
16. Affidavit of Gordon W. Wilcox in Support of Motion for Consideration	8/16/82	245
17. Columbia Defandants' Memorandum Regarding Summary Judgment Briefing Schedule	8/26/82	327.6
18. Memorandum of Washington Public Power Supply System re Scheduling of Chemical Bank Motion and Trial (Hearing date: August 9, 1982)	8/5/82	193
19. Memorandum in Opposition to Motions to Continue or "Strike" Chemical's Summary Judgment Motion	8/5/82	188
20. Motion for Summary Judgment and Motion for Reconsideration by 22 Defendants	9/7/82	401
21. Order Setting Schedule for Briefs Regarding Chemical Bank's Motion for Summary Judgment	9/7/82	399

Name of Document	Filing Date	Clerk's Submittal No.
22. Further Affidavit of John D. Lowery on Behalf of 22 Defendants in Support of (1) Motion for Reconsideration of Dates for Summary Judgment and Trial in Light of New Evidence Discovered in Bond Counsel's Files and (2) Motion to Compel Production of Privileged Documents	9/13/82	419
23. Defendants Ellensburg Ratepayers' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment	9/17/82	451
24. Joinder in Motion for Reconsideration by 22 Defendants-Missoula Electric Cooperative, City of Milton-Freewater and Lincoln Electric Cooperative	9/17/82	4454
25. Memorandum of Washington Public Power Supply System in Opposition to Motions for (1) Reconsideration of Rulings re Summary Judgment Hearing and Trial Dates and (2) Summary Judgment	9/18/82	442
26. Response to Motion for Summary Judgment and for Reconsideration for Twenty-Two Defendants	9/17/82	448
27. Motion of Washington Public Power Supply System for Summary Judgment	9/20/82	460
28. Cross Motion for Summary Judgment of City of Springfield and City of McMinnville	9/20/82	455
29. Memorandum in Support of Cross Motion for Summary Judgment of City of Springfield and City of McMinnville with attached Exhibits	9/20/82	454
30. Response to Plaintiff's Motion for Summary Judgment on Behalf of 22 Defendants (See attached Exhibit A)	9/21/82	474

Name of Document	Filing Date	Clerk's Submittal No.
31. Affidavit of John D. Lowery on Behalf of 22 Defendants (See Attached Exhibit A) Pursuant to C.R. 56(f) in Opposition to Plaintiff's Motion for Summary Judgment	9/21/82	468
32. Motion for Summary Judgment of 22 Defendants (See Attached Exhibit A) Regarding Authority of Washington Municipalities and PUDs to Enter Into Participants' Agreement	9/21/82	469
33. Memorandum in Support of Motion for Summary Judgment Regarding Authority of Washington Municipalities & PUDs to Enter Into Participants' Agreement	9/21/82	469
34. Intervenors-Defendants Clark County PUD Owners Association, et al. and Fair Use of Snohomish Energy et al's Memorandum in Opposition to Chemical Bank's Motion for Summary Judgment	9/20/82	467.8
35. Affidavit of Boyd A. Parker, General Manager of Lower Valley Power and Light, Inc., in Opposition to Plaintiff's Motion for Summary Judgment	9/14/82	427
36. Memorandum of the Oregon Cities of Canby, Cascade Locks and Drain in Opposition to Motion for Summary Judgment	9/20/82	467.7
37. Columbia Defendants' Motion for Partial Summary Judgment	9/20/82	467.10
38. Columbia Defendants' Memorandum in Opposition to Chemical's Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	(corrected copy) 9/27/82	503

Name of Document	Filing Date	Clerk's Submittal No.
39. Affidavit of Herschel F. Jones in Opposition to Chemical's Motion	9/20/82	467.4
40. Affidavit of Lew R. Greene in Opposition to Chemical's option for Summary Judgment	9/20/82	467.3
41. Affidavit of Linda J. Cochran in Opposition to Chemical's Motion for Summary Judgment	9/20/82	467.5
42. Affidavit of David F. Jurca in Opposition to Chemical's Motion for Summary Judgment and in Support of Columbia Defendants' Crossmotion for Summary Judgment	9/20/82	457
43. Oregon PUDs' Memorandum in Opposition to Chemical Bank's Motion for Summary Judgment and in Support of Columbia Coop's Motion for Summary Judgment	9/21/82	482
44. Memorandum and Response of Washington Public Utilities Group to Plaintiff's Motion for Summary Judgment	9/20/82	467.9
45. Memorandum of City of Milton-Freewater, Salmon River Electric, Missoula Electric, Vera Irrigation, Lincoln Electric and Big Bend Electric in Response to Chemical Bank's Motion for Summary Judgment	9/20/82	458
46. Defendant City of Ellensburg's Motion for Summary Judgment	9/20/82	472
47. Memorandum of Defendant City of Ellensburg in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Motion for Summary Judgment	9/20/82	461
48. Affidavit of Robert Walker in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	9/20/82	463

Name of Document	Filing Date	Clerk's Submittal No.
49. Affidavit of Margaret A. Pageler in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	9/20/82	462
50. Correction of Typographical Errors in Columbia Defendants' Memorandum in Opposition to Chemical's Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	9/27/82	502
51. Chemical's Reply Memorandum in Support of Its Motion for Summary Judgment	10/6/82	537
52. Memorandum of Washington Public Power Supply System in Support of Plaintiff Chemical Bank's Motion for Summary Judgment, and in Opposition to the Motions for Summary Judgment of Certain Defendants	10/6/82	536
53. Defendant Ellensburg Ratepayers Cross Motion for Summary Judgment	9/29/82	512
54. Affidavit of Scott L. Schmidtman in Support of Ellensburg Ratepayers' Cross Motion for Summary Judgment	9/29/82	513
55. Defendant City of Richland's Motion for Summary Judgment	9/29/82	508
56. Memorandum of Defendant City of Richland, Washington, in Opposition to Certain Motions for Summary Judgment and in Support of its Motion for Summary Judgment	9/29/82	506
57. Columbia Defendants' Joinder in Other Defendants Opposition to Chemical Bank's Motion for Summary Judgment and in Others' Crossmotions for Summary Judgment	10/7/82	562
58. Motion of Defendant Vera Irrigation District No. 15 for Summary Judgment	10/7/82	547

Name of Document	Filing Date	Clerk's Submittal No.
59. Supplemental Memorandum of Defendant Vera Irrigation District in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Motion for Summary Judgment.....	10/7/82	548
60. Correction of Typographical Errors in Chemical's Reply Memorandum	10/8/82	5665
61. Second Memorandum and Response of Washington Public Utilities Group to Plaintiff's Motion for Summary Judgment.....	10/7/82	542
62. Defendant Ellensburg Ratepayers' Memorandum in Rebuttal of WPPSS's Responsive Memorandum in Support of Summary Judgment.....	10/8/82	566.4
63. Reply Memorandum of Springfield and McMinnville in Support of Motion for Summary Judgment.....	10/8/82	578
64. Second Affidavit of Robert Walker in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	10/8/82	570
65. Response of 22 Defendants (See Attached Exhibit A) to Plaintiff's, WPPSS's and Richland's Memoranda re Summary Judgment.....	10/11/82	582
66. Motion to Strike Affidavit of Richard C. Yarmuth	10/11/82	579
67. Memorandum of Columbia Defendants in Support of Motion to Strike Affidavit of Richard C. Yarmuth	10/11/82	578
68. Columbia Defendants' Preliminary Response to Reply Memoranda of Chemical Bank and WPPSS	10/11/82	574.3

Name of Document	Filing Date	Clerk's Submittal No.
69. Affidavit of Linda J. Cochran in Opposition to Chemical and WPPSS' Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	10/11/82	574.1
70. Supplemental Affidavit of David F. Jurca in Opposition to Chemical and WPPSS' Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	10/11/82	574.2
71. Affidavit of Thomas W. Burt in Opposition to Chemical's Motion for Summary Judgment Regarding Failure of Condition Precedent of Enforceability of Participants' Agreement.	10/11/82	581
72. Additional Affidavit of John D. Lowery on Behalf of 22 Defendants Pursuant to CR 56(f) in Opposition to Plaintiff's Motion for Summary Judgment	10/11/82	583
73. Joinder of 22 Defendants in Other Defendants' Opposition to Chemical Bank's Motion for Summary Judgment and in other Defendants' Crossmotions for Summary Judgment	10/11/82	584.5
74. Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	588
75. Affidavit of John D. Lowery in Support of Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	587
76. Memorandum in Support of Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	586

In addition, the court read but did not consider the following affidavits in reaching its Order on Motions for Summary Judgment of even date herewith:

Name of Document	Filing Date	Clerk's Submittal No.
77. Affidavit of Richard C. Yarmuth in Support of Chemical's Motion for Summary Judgment.....	10/6/82	535
78. Affidavit of Gedale B. Horowitz in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
79. Affidavit of George P. Jenkins in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
80. Affidavit of Harlan R. Kosmata in Support of Chemical's Motion for Summary Judgment.....	10/8/82	568
81. Affidavit of Harlan R. Kosmata Regarding Termination	10/8/82	567
82. Affidavit of Donald W. Mazur in Support of Chemical's Motion for Summary Judgment	10/8/82	569
83. Affidavit of Bert L. Metzger, Jr., in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
84. Affidavit of Morgan J. Murray in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
85. Affidavit of Norman E. Nichols in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
86. Affidavit of Francis J. Quinn in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
87. Affidavit of Norman A. Stoll in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536

DONE IN OPEN COURT this 16th day of November, 1982.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca

By /s/ LINDA J. COCHRAN

Linda J. Cochran

Attorneys for Columbia Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK,

Plaintiff,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Defendants.

No. 82-2-006840-3

COURT'S ORAL DECISION

BEFORE JUDGE H. JOSEPH COLEMAN

October 15, 1982

1:30 p.m.

E713 King County Courthouse

Seattle, Washington

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THE COURT: Good afternoon. Please be seated.

This is a complex case rendered more complex by the fact that we are today reviewing actions taken by public bodies in 1976, with the full knowledge that a disaster has occurred. This fact, however, does not alter the proper application of the various legal rules.

Both sides have offered strong equity arguments with respect to the issues that are before the Court; consequences are obviously enormous. A ruling either way may have substantial adverse effects on the public.

It is not appropriate, however, for the Court to weigh these considerations or to determine what is a popular result but, rather, it is the function of the Court to determine to the best of its ability what the applicable rules of law are.

The ruling will go into some detail with respect to analysis. I will therefore summarize it so that you will know what the Court's ruling is.

The Court will rule that the contract as a matter of law imposes debt service and decommissioning costs on participants, and the Court will also rule that the participants had legal authority to enter into the agreements, with the possible exception of the Vera Irrigation District and participants of other states; the Court, with respect to those matters, has deferred ruling and will consider those issues at a later date.

Before beginning the analysis, several observations are necessary. There are unusual features to the case; it's unusual in one sense in that all participants are not taking the same position. For example, the City of Richland has taken the position that under the contract they are fully responsible and are prepared to proceed. A significant number of the public utility districts, as Mr. Malanca pointed out in the arguments, has not yet determined what position to take.

There are certain undisputed features. I will review these in the context that they have a bearing on contract interpretation questions. The Court is aware that there remain issues that are not to be determined today with respect to contract formation and validity defenses. So these observations are to be construed only in the context of the issues that the Court is deciding today.

It is undisputed that all participants were of the view that entering into this agreement was in their best interest due to the projection of significant power shortages in the Pacific Northwest. The acts taken at that time were for the public purpose of having a block of energy available to them in the future at reasonable costs so as to provide their respective energy needs. It was a form of expanding their capacity to supply electric energy to their respective communities.

Now, again, only in the context of contract interpretation and for the purposes of determining whether we have an agreement that represents the entire understanding of the parties, it is important to make these observations, and, again, this is undisputed. And for these purposes I am relying solely upon affidavits filed by the various participants and drawing all inferences from those affidavits that can reasonably be drawn in their favor.

Each participant received the proposed Participants' Agreement and form of Bond Resoultion and had a period of 90 days to review the document and accept it or reject it. Those affidavits would establish that any significant alterations or, for that matter, no alterations at all would be permitted. Those affidavits also indicate that these agreements were reviewed by counsel for each of the participants. And, again, these documents would indicate that counsel were advised that they would have to respond in the form offered; but, once again, it is important to note that the documents were reviewed by counsel, and counsel for the participants made a decision that the contents of the opinion letter were accurate, and therefore they were signed.

When we get to the question of contract interpretation, there are two issues that need to be determined first.

There are two rules, the plain meaning rule and the intent test. As the Washington Court has observed on a number of occasions, the purpose of the rule is the same, and that is to determine whether the instrument in question represents the entire understanding of the parties. If it represents the entire understanding by the parties, then the contract supersedes tentative terms discussed in earlier negotiations; and, consequently, in determining the content of a contract, the earlier tentative agreement and negotiations become irrelevant.

There is no issue here in terms of the instrument representing the entire understanding of the parties. The issues here is what the instrument means.

The whole question of extrinsic and parol evidence becomes difficult because of the confusion that often occurs in deciding the purpose for which it is being offered.

Now, with respect to interpretation, the Court's first function is to determine whether there is an ambiguity. If there is not an ambiguity, then construction becomes a question for the Court. If there is ambiguity, extrinsic evidence may be received.

The contract construction question involves issues that are normally not involved in cases in the sense that the Court is required at an appropriate time to determine whether extrinsic evidence is even admissible. If extrinsic evidence isn't even admissible, then there is nothing for the Court to consider.

There are different approaches to the interpretation question, but the Washington cases, in the Court's view, have followed the approach suggested by Williston; the Grant County v. Lane Construction case I think stands for that propostion. I will quote: "If there was such an ambiguity that the Court could not reasonably ascertain the parties' intention from the language employed, then parol evidence to explain the ambiguity is admissible. If, however, there was no such ambiguity as in law would warrant the admission of extrinsic evidence to enable the Court to determine what the parties intended, the contract must be construed according to its terms." It is important to note the language that the Court uses, "If, however, there was no such ambiguity as in law would warrant the admission of extrinsic evidence to enable the Court to determine what the parties intended, the contract must be construed according to its terms."

The Court goes on to say that, "The intentions of the parties should be ascertained from the entire writings and if at all possible, all parts of the writing are to be construed so as to harmonize with one another."

Now, it is for this reason that I indicated some of the undisputed facts are important in the context of interpretation. It is important to determine if we are dealing with an in-

strument that purports to be the entire agreement of the parties. It is also important to determine that the parties had an opportunity to review and read that instrument prior to the time they decided to enter into it.

With respect to ambiguity, the Washington cases shed some light as to what is meant by ambiguity. For example, in the Weyerhaeuser case which has been cited by the parties, the question there was not whether the agreement was not an entire understanding of the parties; the question there was whether the intent of the parties could be determined from the agreement itself, it being recognized that the agreement was the entire understanding.

The significant language in that case was "all minerals of any nature whatsoever, including coal, iron," et cetera. A reading of that entire agreement did not enable one to know what the parties meant by the term "minerals of any kind whatsoever." The Court went into detail as to why that was an ambiguity.

There are other cases that demonstrate this same proposition. For example, in The Sons of Norway v. The Boomer case, which is also referred to in these opinions, the question was whether pool tables fell within the terminology of "machines and other devices for public entertainment." A review of the entire agreement did not enable one to determine what the parties intended.

Likewise, in the Forester v. Craddock case, the ambiguity was between two sections of the contract, one section indicating that there was a maximum amount with respect to the construction contract, another section indicating that the method of payment was a cost-plus method.

Once again the Court emphasized that the contract as a whole was not free of ambiguity. In other words, it could not be read in such a fashion so as to remove the ambiguities.

The fact that a document is inartfully drafted or that it may have conflicting provisions or that it may be read so as to seem conflicting does in and of itself not raise an ambiguity for purposes of contract construction. If the instrument as a whole supplies the meaning, then the intent is determined based upon the writing and there is not resort to extrinsic evidence.

It is important to observe, also, that even if extrinsic evidence is received to determine intent, we are only interested in manifestations of bilateral intent; objectively manifested actions must be to the exclusion of oral statements unless such oral statements clearly show themselves to be bilateral ones. Again, there are a number of cases that demonstrate this proposition. Eagle Insurance v. Allbright is one of the specific cases that does that.

Now, the Court is of the view that this conclusion is supported on either prong of a two-prong analysis. In a few moments the Court will go through the analysis that it has exercised in order to reach this conclusion. But the contract itself, without even considering extrinsic evidence, leads to this conclusion, given the rule that one must first look to the rule and determine if it can be construed standing alone. And as has already been indicated, if it cannot be construed standing alone, then extrinsic evidence may be received.

But even assuming for the moment that extrinsic evidence is properly to be considered, the state of the record suggests this—and, again, I am relying only on affidavits and documents presented by participants. As I indicated—and this will become important with respect to some of the formation defenses—as I indicated, the briefing schedules were such that affidavits filed by the Supply System in support of the motion for summary judgment, which purported to cover all issues, did not provide sufficient time to reply to some of those affidavits. It was for that reason that the Court indicated that that portion of this motion that relates to validity defenses would have to be deferred and considered at a later time.

In any event, taking the undisputed evidence that is before the Court, the only thing that is offered on behalf of participants are indications of subjective feelings or subjective conclusions or subjective intent.

The complaint has been raised that there has been inadequate time for discovery. Without commenting on that one way or the other, it is important to observe that counsel for participants have unique access to their own clients, and there has been sufficient time for there to be the production of any evidence that would indicate bilateral manifestations of objective to the intent, and the record is simply void of any fact affidavits along those lines.

Now, with respect to the contract itself, the contract contemplated a number of eventualities. The key to understanding this contract is to review it and understand from its language that it was drafted so as to cover these various eventualities. There was not one project in progress, there were two projects in progress; and the contract was covering both projects.

The eventualities the contract covered are as follows: Precompletion termination for one or both plants. And Section 13 of the Participants' Agreement and Section 6.2(a)3 and Section 6.9(j) of the Bond Resolution are sections that are indicative of this.

It also contemplated post-completion termination of one or both plants. And it also contemplated completion of one or both plants.

It was also contemplated that bonds would be sold and the proceeds would be used to finance construction; and that, subject to the terms of the agreement, participants therefore would not pay for construction costs for the reason that construction costs would be paid from the proceeds of bond sales.

It is also axiomatic that there would be a market for revenue bonds only so long as a project was under construction.

It is also clear that the Supply System bound itself to make the necessary transfers from the revenue fund to the bond fund to pay all principal and interest on the bonds when due.

Furthermore, it is also clear that, with the exception of bond proceeds,the only source of available funds to the Supply System were the payments to be made under the agreement entered into with the participants.

The bonds were special revenue bonds, and this was the only source of payments.

The parties provided in the Participants' Agreement and the Bond Resolution, which was made a part of the Participants' Agreement and must be construed in conjunction with it, also provides that the agreement would remain in effect until payment of all principal and interest on the bonds have been provided for.

A prospective bond purchaser upon review of the documents would be apprised that the security for the security for the bonds if the projects were not completed would be the pledge of revenue by the participants of their utility properties for payments required under the Participants' Agreement; and if completed, the security for payments would be the unconditional payments required under the agreement. And I will be discussing Section 6(d) in a moment, but Section 6(d) requires some special construction. In any event, that is what a prospective purchaser would realize from reading the documents; in other words, that there was a source of funds not predicated upon revenue being produced from the project itself and that there was a security for the bonds separate and apart from completion.

The further fact that the agreement embraced the possibility of pre-completion termination for both projects makes it clear that the security for repayment of the bonds, including interest, was not limited solely to revenues received from an operating project.

With this background, we can turn to the key issue, and that is what was meant by the language "payments to be made by participants under the agreement."

One has to examine why construction costs were eliminated from the annual budget. A careful examination of the agreement leads to only one conclusion, and that is they were eliminated to ensure that participants would not pay for costs which had already been funded or for which funding provisions were available. This answers the question as to why under the annual budget they were excluded. They were not excluded to ensure that participants would not have a dry-hole risk.

Let me go through this. Under 6.9(f) of the Bond Resolution, interest accruing to July 1, 1988, which is not payable pursuant to Section 6.2(a)1 would be a cost of construction. In other words, interest accruing to July 1, 1988, which is not covered by revenue from a completed plant, is a cost of construction. Under 6.2(a)2, after July 1, 1988, interest accruing on the bonds to be paid from the revenue fund into the bond fund interest account; notice that you still may not have completed projects and, therefore, no revenue, if you accept the construction that participants have placed upon the term "rev-

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enue." In that connection it is important to note other sections of the agreement that talk in terms of the Supply System's obligation and the fact that the revenue fund would receive all receipts, profits, moneys, et cetera.

If there was a termination prior to July 1, 1987, the provisions of 6.2(a)3 are applicable. The payments are to be made, one, when a project is terminated before July 1, 1987, since it takes one year after termination before the annual budget goes into effect, so there is a need only to cover the event of termination up until July 1, 1987, as post-July 1, 1988, costs are already covered; and, two, for an amount of interest accruing on the bonds, which constitutes a cost determination less revenue from completed plants, 6.2(a)1, and less amounts deposited with the bond fund trustee from sales of bonds, 6.8(a)2, all payments to be made from the revenue fund.

Now, to summarize this, before July 1, 1988, these are the sources of payment for interest on the bonds: one, sale of bonds, under 6.8(a)2; two, revenue from completed plants, under 6.2(a)1; and, three, money from the revenue fund less moneys collected from the sale of bonds and money collected from revenue from completed plants, under 6.2(a)3. So if you take each of those sources—source one, source two and source three—you have 100 percent.

After July 1, 1988, it comes from the revenue fund entirely, and that equals 100 percent, notwithstanding the contemplated possibility of incompleted projects at that time.

In a situation where both projects are terminated, debt service is a cost of termination, there having been an appropriate credit for any cost of termination paid from the construction fund. Again, I refer you to the sections that the Court has discussed.

Interest on the bonds for plants which have been terminated is to be paid as a cost of construction to the extent that construction funds are available, pursuant to Bond Resolution 6.2(a)3, which provides for monthly payments of interest on bonds for terminated plants; Section 13(a)3, which provides that a final accounting statement is to be rendered indicating the amount of payment to be made by participants for termination, does not control the timing of debt service payments

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following termination. Rather, its essential purpose is to provide that the participants are given proper credits for the fair market value of any assets relating to the terminated plants.

Now, again to review briefly, the instrument as a whole makes it unmistakably clear that: All interest and principal on the bonds is to be paid and the System undertakes this unconditional obligation; the agreement is to remain in effect until the obligation is discharged; the sole source of income to the System comes from participants; the only other funding source is from the sale of bonds.

Section 6(d), which refers to payments required to be made under the agreement, is important in interpreting the total context of the agreement, because it uses the language "whether any of the projects are completed, operable or operating," again indicating that there is to be an annual budget and money is due from participants notwithstanding the fact that there may not be any operating plants.

Section 1 of the agreement makes it clear that debt service is an item that is to be included in the annual budget. And the Court has already discussed at length its views as to what the contract says concerning the exclusion of construction costs.

Now, as the Court has indicated, the fact that an instrument must be read carefully and in its entirety or the fact that it has inartful phraseology does not in and of itself raise an ambiguity.

The next question is the authority question. The first issue raised in that regard is the authority of the Supply System itself to issue the revenue bonds. The answer to that question is in the affirmative, the Supply System did have the authority to issue revenue bonds. Again, one must go back to the date of issue and examine it at that time.

The bonds were issued with the sole source of revenue for payment limited to moneys received as a result of the operation of the project for which the bonds were issued. That statute cannot be read so as to require that there be existing utilities in operation. Again, if the pledge of revenues is solely limited to moneys that would be received in conjunction with the operation, the bonds have been properly issued.

Separate and distinct from this question is whether cities and districts had the authority to enter into this agreement. There are several statutes and some cases that have led the Court to the conclusion that they did. In most respects the Court found the authority question to be the most difficult in this area.

Beginning with Chapter 43, there are several statutes the Court wishes to read. I am not going to review all of the statutes that were cited—the citation of these statutes are in the record—but there are some statutes that the Court thinks are critical in this regard, the first being 43.52.300.

43.52.300 relates to the powers and duties of an operating agency. Subdivision 3 provides "To negotiate an enter into contracts with the United States or any of its agencies, with any state or its agencies with Canada or its agencies, or with any district or city of this state, for the lease, purchase, construction, extension, betterment, acquisition, operation and maintenance of all or any part of any electric generating and transmission plants and reservoirs," the rest not being significant for these purposes.

But, again, the broad power to negotiate and enter into contracts with district or cities of this state for the lease, purchase, construction, extension, betterment, acquisition, operation and maintenance of all or any part of any electric generating and transmission plants and reservoirs.

The next statute would be 43.52.391, and that statute provides, "Powers and duties of an operating agency. Except as otherwise provided in this section, a joint operating agency shall have all powers now or hereafter granted public utility districts under the laws of this state." The next-to-last paragraph: "An operating agency may make contracts for any term relating to the purchase, sale, interchange or wheeling of power with the government of the United States and any agency thereof or any municipal corporation or public utility, within or without the state, and may purchase or deliver power anywhere pursuant to any such contract," omitting the remainder of the statute.

43.52.410, "Any city or district is authorized to enter into contracts of compacts with any operating agency or a publicly

or privately owned public utility for the purchase and sale of electric energy or falling waters."

And 550, "Any municipal corporation, cooperative or mutual which has entered into a contract with an operating agency to participate in the construction or acquisition of an energy plant as defined in Chapter 80.50 of the RCW, shall annually adopt a plan for the repayment of the contractual obligation," et cetera, et cetera, et cetera.

And the last statute in this chapter that is important, 43.52.910, "This chapter shall be liberally construed to effectuate its purposes."

If you look at the statutory scheme, there is very broad authority on the part of the operating agency and, as was argued by Mr. Yarmuth, given the fact that it is to be liberally construed, it appears to the Court the Legislature had in mind that they would be able to contract with the entities named for the very purposes of carrying out the functions for which they had legislative authorization to carry out.

54.16.040 is important in that it makes reference to, "A district may purchase, within or without"—this is referring to public utility districts—"A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current," et cetera, et cetera, et cetera, again indicating that public utility districts also have this power.

35.92.050 is important in this connection. It provides, "Authority to acquire and operate utilities. A city or town may also construct, condemn and purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power," et cetera.

At the bottom part of the statute after the semicolon, the statute goes on to say, "Authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its

inhabitants and to other persons doing business within the city or town and regulate and control the use thereof."

The Metro case that has been cited has some application to this case. Again, it does not cover a situation such as we have here, but there is language in this case that is instructive on both the authority issue and the debt issues that we will be coming to in a moment.

The Court in the Metro case, and the Metro case also involved a financing operation, the Court cites RCW 35.21.210, "Any city or town shall have power to provide for the sewerage, drainage and water supply thereof, and to establish, construct and maintain a system or systems of sewers and drains and a system or systems of water supply, within or without the corporate limits of such city or town, and to control, regulate and manage the same." The Court goes on to say, "The statute grants to cities and towns the power to provide for a system of sewers within and without their corporate limits, and to control, regulate and manage the same. It must follow that with the power to provide a sewer system there is implied the power to pay for it unless otherwise prohibited by the charter or statute."

Basically, the power to purchase something carries with it the power to pay for it; the power to pay for it carries with it the power to make arrangements to pay for it. The cases have indicated a broad and liberal construction to be given the interpretation of these statutes. And cities, towns and districts are purporting to operate within these statutes so as to supply the services that the statute refers to, particularly when in doing so the public moneys are not obligated. And I recognize that that is a very sensitive term in this case, that the term "public moneys" in law has a specialized meaning, and that is tax revenues and revenues available to the general fund.

54.44, which is the statute that talks in terms of joint ownership of certain facilities, is, the Court believes, in the final analysis an enabling statute rather than a prohibitory statute, particularly in view of the myriad of other statutes that give cities virtually of any size the power to act in this fashion.

In addition to that, there are some restrictions in 54.44 that relate uniquely to ownership beyond that, to the extent that an ownership interest is considered significant. It is important to

observe that under the Participants' Agreement the participants have many of the indicia of ownership. For example, they have the power to approve or disapprove budgets both in the construction and post-construction phases, they also have the right to participate in the distribution of assets. There are some important indicia of ownership that they do not have. But in the final analysis, the Court is not of the view that 54.44 is intended to restrict, again given the cases that talk about the fact that cities or towns will have all the powers necessary to carry out the duties given them under these various statutes.

That brings us to the question of debt. The first question, of course, is whether there is debt. I think not in the constitutional sense of that word. Debt has been construed, for constitutional purposes in Washington, to involve only borrowed money. There are only two cases that I will refer to, there are many more; they have all been cited and extensively discussed in your briefs.

The first one that I will make reference to is State, ex rel. Troy v. Yelle 36 Wn. 2d at 192, Judge Hill speaking for the Court: " 'Debt' refers only to borrowed money and not warrants to meet current expenses. It is our interpretation that debt within the provision of Article 8, Sections 1, 2 and 3, is borrowed money and not warrant obligations for the payment of the current expenses of the state government, such as services rendered and materials furnished. Framers of the constitution had in mind two types of obligations, those for current expenses and those for the repayment of money borrowed. Constitutional provisions have reference only to the second type of obligation."

If that was the only case we had, the language would lend itself to being distinct. Probably the most authoritive statement on the subject is that of Judge Hill in State ex rel. Wittler v. Yelle 65 Wn. 2d, and I'm quoting on Page 669, that, "This court has historically considered state debts within the meaning of Article 8, Sections 1, 2 and 3 of the state constitution to mean obligations arising from the borrowing of money may be seen from a panoramic view of our cases affecting constitutional debt limitation. With but two exceptions, Allen v. Grimes and State ex rel. Troy v. Yelle, each involving warrants, all cases have concerned borrowed money, debts created by the issuance of

bonds. We know of no cases decided by us since statehood in which we have held Article 8, Sections 1, 2 and 3 applicable to other than borrowed money."

And for the constitutional purposes, as has also been pointed out in the argument and in cases cited in the brief, the provisions dealing with municipal authority are also included, the case of Winston v. Spokane being authority for that proposition.

Judge Hill goes on to say on Page 670, referring to State Building Financing Authority v. Yelle, he says, that "seems no exceptions to this line of cases for there we held that the issuance of bonds to finance the construction of public buildings through a leasing arrangement with the state's own institutions and agencies put the state in debt beyond the limits fixed by the constitution. Since under the act, the legislature was obligated to appropriate to each leasing institution and agency sufficient funds for rentals, we held on final analysis that the state was actually issuing bonds payable from general taxes. In short, it was borrowing money by selling bonds against the state general fund."

He also discusses State ex rel. State Finance Committee v. Martin, and he says, "Nor does"—this case—"depart from the idea that Article 8, Section 1, uses the word 'debt' to mean a debt incurred through the borrowing of money. When in that case we answered the question: What is a debt of the State of Washington? by saying it was an obligation which must in law be paid from any taxes levied generally, we were referring to debts created by the issuance of bonds to be redeemed from sales tax—excise taxes which are levied generally—hence debts created by borrowing money. Our reasoning in that case must be deemed peculiarly applicable to the facts then before us," and then he refers to cases from other jurisdictions, and he concludes by saying, "We have come to the conclusion, therefore, that, since the state has neither borrowed any money nor issued any bonds, debentures, certificates or other instruments by which a debt may be evidenced under and by virtue of the laws of 1963," et cetera, "we find both sections to be a valid and constitutional exercise of the legislative powers."

The answer to the question under the constitution is that we do not have borrowed money here as that term has been construed uniformly by the cases.

Now, with respect to statutory debt, even assuming that we have debt for statutory purposes, the special fund doctrine is applicable. Likewise, even assuming we have debt for constitutional purposes, the special fund doctrine is applicable. And with respect to a conditional sales contract, again assuming we have a conditional sales contract—and I don't make that assumption—even assuming we have a conditional sales contract, again the special fund would be applicable. The conditional sales contract talks as all other debt limitation statutes talk, and that is in the sense of placing a limitation with a ratio that is directly attributable to the tax assessments.

Insofar as an analysis of debt is concerned, there is a substantial problem with that analysis also, inasmuch as you must make a determination as to what the debt is at the time it is incurred. And Mr. Mack's arguments in that regard are persuasive.

The special fund doctrine. A very persuasive, forceful argument has been offered by Mr. White with respect to the functional equivalent test, that we are dealing with the functional equivalent of a tax. The difficulty with that analysis is that it is not supported by any of the cases. There is only one court in which there is a discussion along those lines, and that, of course, is the Piedmont case wherein it is discussed in the dissent. That is an intriguing, even appealing, analysis, and it may well be that the Legislature will wish to review debt limitation in this area. It may well be that in view of the facts of this case the Supreme Court will wish to reexamine its prior holdings and either indicate that they have been too narrowly construed or to narrow them or to expand them. But the fact of the matter is that under the current state of the case law, both in Washington and elsewhere, taxes mean just that, the general taxing power of the organ of government or the pledging of the full faith and credit of the entity involved.

If there is not the pledging of the full faith and credit of the entity involved and if there is not an invocation of the taxing power, then there is no violation of debt limitation statutes.

Our cases, and other cases talk even more specifically, talk in terms of a special fund being appropriate if the source of the funds is limited to the project for which the bonds were issued or if the funds come from some other source separate and apart

and completely distinct from the taxing authority. If that is the case, then the special fund doctrine applies.

The argument has been raised, and it has been addressed in cases, that how is this different from an excise tax, one doesn't have to purchase whatever object upon which there is an excise tax. The cases that have dealt with that have indicated that the reason that an excise tax is implicated is for the reason that is a general fund source of revenue; and therefore by pledging an excise tax you are dealing with the taxing power and you are also depleting the general fund.

So once again one is led back to the inevitable conclusion that under the current state of the law, user fees, public utility revenues do not fall within public moneys as that term is defined.

Now, as the Court has indicated, that argument has been strongly and persuasively advanced, but it is the function of a trial court to review the status of the current law and determine what that law requires, if it can.

Now, there are cases from other jurisdictions, and I want to refer to those in a moment.

I do want to talk about the risk analysis for a moment. There are two problems with the risk analysis. Assuming that it is defined as it was defined by those offering the risk analysis, the Washington cases have gone beyond a limitation to revenue-producing objects themsleves; for example, the state capital fund cases where the moneys to pay for the construction are coming from lands which were given to the state and dedicated for that purpose.

The argument has also been advanced that it must come only from what is then being constructed. The Twichell case in this jurisdiction doesn't stand for that proposition. There are cases in other jurisdictions that have followed the Twichell line of authority. So once again, that is what we are dealing with with respect to those two matters in Washington, at least given the state of the law today.

The risk analysis is defective, in the Court's view, for one additional reason, and that is the very term "risk analysis" requires one to consider what is it that the framers of the

constitution and what is it that the Legislature wanted to protect from risk. They wanted to protect the general revenues. So the risk analysis in its proper interpretation involves a consideration of just that. And, again, if you look through the cases, both here and in other jurisdictions, they always talk in terms of the source of the funds being the project or some other source, and they always emphasize that the taxing power hasn't been invoked.

So for purposes of debt, the Court is of the view that if, in the first place, there isn't debt at least insofar as the constitution is concerned, and if there is debt under the constitution and assuming the statutes that have been cited apply, the transaction in question is saved by the special fund doctrine. An I have already indicated why I believe that the executory or conditional sales contract must fall within the same analysis.

The Court is of the view that on the state of the record there are not fact questions with respect to the lending of credit. The cases that have been cited in that regard are persuasive with respect to a consideration for basic underlying public purpose of the venture. The Court is of the view that there is not a delegation of authority issue. The Court is of the view that the interstate compact clause is not implicated, principally for the reasons argued in Mr. Yarmuth's brief, and I will not go into more detail on that at this time.

Let me refer to the cases from other jurisdictions. Now, these cases all have distinguishing features: they involve either contracts with respect to power sales, enterprises that have differing features, or the statutory scheme is different. But there is language particularly as it relates to the user fee argument and the debt argument that are applicable with respect to this case.

In State v. Texas Municipal Power Agency, 565 Southwestern 2d 258, on Page 265 of the report, "The intervening cities have the authority to produce electricity for sale to their respective inhabitants. They therefore are authorized to contract with TMPA or other private corporations for the purpose of securing electric power for distribution to their inhabitants." This is authority for the proposition that there was basic authority to enter into this agreement. This case also talks in terms of the lending of credit, but I am more interested in what

it has to say with respect to the issues that were discussed and argued at length.

On Page 275 of the opinion the Court says, "In City of Big Spring v. The Board of Control the Court determined that the City of Big Spring had the authority to make a contract with the State of Texas to furnish water to the Big Spring Hospital in the exercise of a proprietary or business function. The Court stated, 'In such capacity a city can make a contract under the authority of legislative enactment in all things as an individual or private corporation.' "

This case does not turn on whether we have a proprietary or governmental function, because that distinction does not have the meaning in this state that it has in other states. The cases cited stand for the proposition that when you are making arrangements to supply electricity or to add to or improve your facility in that regard, you are probably acting in a governmental capacity. Also, the statutes and the cases and the provisions quoted indicated that in the course of doing so you have all the necessary powers to carry that out. The way you handle the sale of your energy in Washington appears to be a proprietary power.

But it is also important to note that in a case where you purport to deal only with the revenues that come from such a facility, you have, to a degree, a mixing of the concepts. And for authority purposes and for debt limitation purposes the courts have always looked closely to whether or not one is acting in such a fashion to implicate tax revenues. If one is not acting in such a fashion so as to implicate tax revenues, then the authority has been given a broad construction if it was the type of authority necessary to carry out the specific duty or obligation that one had. Now, that is simply going over in part what has already been analyzed.

In the Wyoming case of Frank v. the City of Cody, 572 Pacific 2d on 1114, "This court has consistently held that there is no debt against the municipality created within the purview of the constitutional limitation when the amounts due are payable solely from a special fund, not fed by taxes where prohibited, created from service charges only collected from users." Service charges are not a tax. They go on in the next column to say, "It is the prevailing view not only in Wyoming

but elsewhere that no debt is created within the constitutional limiting provision when the obligation is payable from the income of self-sustaining public utilities." In that case there was some language with respect to other funds legally available, and they talked in terms of the fact that that would not be available other than the public utility revenues.

So once again, if there is any language in an agreement that would indicate that in any way general revenues can be reached, then there is an issue. If not, the issue is normally found not to have any significance.

On Page 1117 of the opinion, "It is apparent that Cody and the other municipalities parties to the contract must get their electrical energy from some source. Where there are no limitations or restrictions as to a mode of contracting provided by the legislature to carry out a power plainly and expressly bestowed upon a municipality, the appropriate method is left to the discretion of municipal authorities, with the usual test of validity being whether the contract is reasonable."

Reasonableness, again, is based upon a consideration of what existed at the time the particular act was taken.

The last case that the Court will quote from is State ex rel. Mitchell v. the City of Sikeston, 555 Southwestern 2d at 281, and, again, as Mr. White pointed out in his argument, there are many distinguishing features with respect to a number of issues that are before the Court, but it has instructive language with respect to other issues that are before the Court.

On Page 292 of the opinion, "However, the obligation of the purchasing municipalities in this case is not an indebtedness within the terms of Article 6, Section 26(a) and (b) of the constitution." They go on to say that that has always been construed to be a debt which must be paid directly or indirectly by resort to taxation. And in the next column they say, "The proscription against municipal indebtedness without voter approval is only applicable in a situation where the municipality proposes to spend tax revenues." The last paragraph of the column, "Relators also contend that these contracts violate Article 6, Section 26(d), of the constitution because the obligations of the purchasing municipalities are unconditional." And they refer to a case cited and the Court says, "That case is

distinguishable, however, in that they proposed in addition to using the rentals from the hospital, to use tax receipts from the hospital district and therefore brought it within the indebtedness provisions of the constitution."

Now, there have been cases which have been cited and discussed in the oral arguments, again, that indicate that when the contract is worded as it was in the Participants' Agreement there is no danger that the general revenues of the city can be involved if a city is brought against the city. The Ellensburg intervenors and Ellensburg have raised this argument. It is clear from the cases that there is no liability, the sole liability being revenues produced by the revenues of the particular utility involved.

The Court indicated that it would discuss Section 6(d) of the contract. 6(d) of the contract says, "The Participants shall make the payments to be made to the Supply System under this agreement whether or not any of the projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either project for any reason whatsoever in whole or in part. Such payment shall not be subject to any reduction whether by offset or otherwise and shall not be conditioned on the performance or nonperformance by Supply System or any other participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy."

Now, Section 6(d) might be subject to the construction argued, in part at least, by the Supply System and Chemical Bank if there was a period after "instrument." It appears to the Court, and this question will be before the Court again as we continue, but it appears to the Court that Section 6(d) means this: It prevents a unilateral refusal to make payments on a claimed breach. It does not prohibit such a claim being raised in the context of litigation; otherwise, there would be no meaning to the language "the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy." At best it means that once it is determined that the contract has been validly entered into, the payments become unconditional, one may not unilaterally use

setoff or reduction, that the payments must continue until the claim of breach has been adjudicated in favor of the party claiming breach.

The argument here has been with respect to termination. The contract specifies a means whereby the Supply System through its board of directors may terminate a project. And in terms of following those steps, the steps were followed. It does not mean, however, that one is precluded from raising the argument that it was wrongful, that the standard was not applied and that therefore there was a material breach rendering any further performance inappropriate.

There is also an issue in the case with respect to whether prudent utility practices were used. It appears to the Court that there was not an intent on the part of the parties in entering into 6(d) to foreclose litigating these types of issues, but there was an intent to ensure that there would not be any unilateral setoff or reduction of payments, one would have to resort to one's legal or equitable remedy. A legal or equitable remedy is virtually unlimited; it allows all actions of law, it allows all actions for equitable relief.

The Court has indicated that there are contract validity questions still before the Court; The Court indicated that it did not feel that the record was in a posture where it could rule in that regard for the reason that the moving party, in this instance Chemical Bank, also the Supply System. Chemical Bank relied upon the agreement itself; the Supply System filed affidavits that related both to contract interpretation questions and, arguably, to other matters as well. Therefore, an apropriate period of time is necessary to allow participants to reply to any of those affidavits. The court can have another hearing to determine what fact issues, if any, remain for purposes of trial and what issues are appropriate issues for the Court to decide; and in that instance, the Court has cautioned that unless it is clear there are no fact disputes and it is clear that the Court can enter an order as a matter of law, one must approach summary judgment carefully because summary judgment can be granted only if it resolves or disposes of a claim in whole or in part. Judgment means exactly that, it must be final in the sense that it is a judgment. This therefore cannot be construed as a summary judgment. The motion to dismiss based upon lack of

authority is denied, the Court having ruled as a matter of law participants did have authority. The contract interpretation question must, at this stage at least, be in the form of an interlocutory order until the Court has had an opportunity to review and determine validity questions with respect to the contract. Once those are decided, it will be possible to determine how to proceed with trial. What the Court would anticipate is that the contract validity questions will be tried, with breach questions being separated for trial at some appropriate time in the future, given what the Court believes to be the correct construction of Section 6(d).

Now, the Court can hear from you, not today but at some later day, with respect to timing; I would suggest a period of two to three weeks for the parties to file any affidavits in reply to Supply System's affidavits as they relate to questions of contract validity, that we have a hearing to determine what issues remain for trial, and that following that, we proceed on the projected trial date of November 29th, or if a continuance is necessary in that regard, that the Court hear from you after you have had an opportunity to assess the impact of this ruling and that we still proceed on the assumption of attempting to resolve contract validity questions, preferably on the date indicated, November 29th, with consideration being given to the month of December or early January, if that should be necessary, but bearing in mind that the validity questions will probably be treated separately, therefore it may not involve the necessity for any time continuances.

Beyond that, it may be appropriate, when those have been determined, to assess the posture of the case to see any portions of it are at that time ripe for review; those are matters that we can discuss.

The Court has gone over its reasons with respect to the contract interpretation. I had intended to make reference to the fact that the argument in support of the participants' position was a detailed, sophisticated argument and obviously a prodigious effort, but it appeared to the Court that when the contract was read in its entirety, that it permitted only one reasonable meaning, and that was the participants undertook to pay debt service and all other costs for these projects whether completed or not; and it was for that reason that the Court

ruled. There are numerous provisions in the contract to support that provision: the triggering of termination dates, the fact that an annual budget commences at the earliest of those particular dates, the fact that the provisions in the annual budget make specific reference to debt service, the fact that the contract has a plain and clear explanation as to why construction costs were not included, particularly when you look at the sections that involve credits, 6.9 must also be read in connection with, I believe it is, 6.82. But in any event, I am sure all of you can recite these provisions now by heart, so you know what I am referring to.

The Court has appreciated the quality of the briefs and arguments. The Court understands that it is a difficult matter for everyone concerned, but the Court has given you as complete an analysis as it feels it is able to at this time.

We will be at recess.

APPENDIX F

IN THE

Supreme Court
OF THE STATE OF WASHINGTON

CHEMICAL BANK, a New York corporation,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1 of Benton County, Washington; CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT Oregon; PUBLIC UTILITY DISTRICT NO. 1 of Chelan County, et al.,

Respondents,

MANDATE

No. 49868-7

King County No. 822068403

The State of Washington to:

The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 6, 1984, became the decision terminating review of this court in the above entitled case on December 17, 1984. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

Costs will be taxed by Supplemental Judgment.

Order Denying Motion for Reconsideration was entered herein on December 17, 1984.

[SEAL]

TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of December, A.D. 1984

REGINALD N. SHRIVER
Reginald N. Shriver
Clerk of the Supreme Court,
State of Washington

cc: Counsel as Attached
Reporter of Decisions

APPENDIX G

296 Or. 550, 679 P.2d 1316

Peter DeFazio, David Dix, Leslie Ratley, Gwen E. Ross, William F. Palmer, Fred McDaniel, Norma McDaniel, Frederick B. Simmons, Robert R. Davis, John C. Montgomery, Robert N. Faught, Mary Boyersmith, Lloyd Larry Roberson, Harold Loroy Davis, Fred J. Stigall, Paul M. Stewart, Harold Eller, Terry Bollenbaugh, Gary W. Ensign, Will Brown, Rhonda Sparks, Bonnie Charles, Michael Faught, Glenn Sofge, William E. Morrisette, and Janice M. Morrisette (Springfield Ratepayers); Cascade Steel Rolling Mills, Inc., An Oregon Corporation; Cascade Tractor & Implement Co., An Oregon Corporation; McDaniel Feed & Grain Co., An Oregon Corporation; Jack Wright; Waldo Farnharn; John Jankowski; Charles E. Colvin; A.E. Hurl; Chuck Neilson; Stan Amundson; Merle Lingle; Hans Simon; Jerry Lucas; William B. Nourse; Doyle Smith; Chester McDonough; Ezra Koch; Bill O'Dell; Gary Brooks; Chester Gibson; Del Casteel; (McMinnville Ratepayers);

Plaintiffs-Respondents/
Cross-Appellants,

The City of Drain, A Municipal Corporation (Drain); Canby Utility Board, An Independent Governmental Subdivision of the City of Canby, A Municipal Corporation (Canby Utility Board); The City of Bandon; A Municipal Corporation (Bandon); The City of Cascade Locks, A Municipal Corporation (Cascade Locks); Donald Maples; John Bendele; Jack Barber; and Charles Robert Miller (Drain Ratepayers);

Plaintiffs-Respondents,

v.

Washington Public Power Supply System, a Washington Municipal Corporation (WPPSS); City of Springfield, A

Municipal Corporation, Acting By and Through The Springfield Utility Board (Springfield); City of McMinnville, A Municipal Corporation, Acting By and Through Its Water & Light Commission (McMinneville); City of Milton-Freewater, A Municipal Corporation (Milton-Freewater);

Defendants-Appellants/
Cross-Respondents,

Northern Wasco People's Utility District, A Municipal Corporation and People's Utility District of The State of Oregon; Tillamook People's Utility District, A Municipal Corporation and A People's Utility District of The State of Oregon; Clatskanie People's Utility District, A Municipal Corporation and People's Utility District of The State of Oregon; and Central Lincoln People's Utility District A Municipal Corporation and People's Utility District of The State of Oregon,

Defendants-Respondents.

TC 16-81-11344; CA A26721; SC 29649

Supreme Court of Oregon,

In Banc.

Argued and submitted June 9, 1983.

Decided March 20, 1984. Rehearing Denied May 1, 1984.

Reversed and remanded.

Lent, Linde and Roberts, JJ., filed a concurring opinion.

Peterson, C.J., filed a concurring opinion in which Campbell, Carson and Jones, JJ., joined.

James H. Clarke, Portland and Bruce Smith, Eugene, argued the cause and submitted brief for Defendant-Appellant/Cross-Respondent Washington Public Power Supply System. With them on the brief were Frank Gibson and Cass, Scott, Woods & Smith, Eugene; David H. Wilson, Jr. and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland; Richard C. Yarmuth and Culp, Dwyer, Guterson & Grader, Seattle, Wash.

Garry P. McMurry, Portland, argued the cause and submitted brief for Defendants-Appellants/Cross-Respondents Cities of Springfield, Milton-Freewater and McMinnville. With him on the brief were Peter A. Mersereau, James A. Fitzhenry and Rankin, McMurry, VavRosky & Doherty, Portland; Douglas E. Hojem and Corey, Byler & Rew, Pendleton; David C. Haugeberg, Gary A. Rueter and Haugeberg & Rueter, McMinnville.

Robert L. Ackerman, Springfield, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants Springfield Ratepayers. With him on the brief were Ackerman, DeWenter & Huntsberger, Springfield, and Lawrence D. Salmony, Certified Law Student, Springfield.

Martha L. Walters, of Johnson, Harrang & Swanson, Eugene, argued the cause for Plaintiffs-Respondents City of Drain, Drain Ratepayers and City of Bandon. With her on supplemental briefs were John H. Hammond, Jr., Oregon City, representing Plaintiff-Respondent Canby Utility Board and Wilford K. Carey, Jr., Hood River, representing Plaintiff-Respondent City of Cascade Locks.

John R. Faust, Jr., Portland, argued the cause and filed brief for Defendants-Respondents Central Lincoln People's Utility District and Clatskanie People's Utility District. With him on the brief were Donald A. Haagensen, Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland. With him on memorandum of additional authority was George P. Winslow, Jr., Tillamook, representing Defendant-Respondent Tillamook People's Utility District. With him on additional authorities was Stanley D. Heisler, The Dalles, representing Defendant-Respondent Northern Wasco People's Utility District.

Willard L. Cushing, McMinnville, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants City of McMinnville Ratepayers. With him on the brief was Cushing, Johnstone & Peterson, P.C., McMinnville.

LINDE, Justice

In 1976, the Washington Public Power Supply System and 88 governmental and cooperative entities in six states entered into a set of agreements under which the system, hereafter designated WPPSS, would construct and operate two nuclear-powered generating plants, Washington Nuclear Projects (WNP) 4 and 5, and the participating entities, referred to as the "participants," would be entitled to fractions of the power generating potential of these plants in return for specified financial obligations. The present litigation concerns the question whether various Oregon participants could legally commit themselves to the terms of these agreements. Upon suit brought in 1981 by ratepayers of the City of Springfield, one of the participants, later joined by a number of other private and municipal plaintiffs, the circuit court rendered a judgment declaring the Participants' Agreements executed by seven cities and four People's Utility Districts to be *"ultra vires,* void and invalid." Defendants appealed, and we accepted certification of the appeal by the Court of Appeals to this court pursuant to ORS 19.210 and ORAP 17.05.

I. THE PARTIES' POSITIONS

Because some of the issues are common to several parties and others are not, it is necessary to sort out the parties' positions in this action.

The action began with a complaint filed on December 22, 1981 by plaintiffs DeFazio, Dix, and Ratley, as consumers of electricity distributed by the Springfield Utility Board, an agency of the City of Springfield, against the City of Springfield and the Washington Public Power Supply System, alleging the invalidity of the city's agreement with WPPSS and seeking declaratory relief. During the months of March to May, 1982, motions to intervene were filed by the cities of Drain, Bandon, Cascade Locks, Milton-Freewater, McMinnville, and the Canby Utility Board, by ratepayers served by the cities of Drain and McMinnville, and by the Clatskanie, Central Lincoln, Tilla-

mook and Northern Wasco People's Utility Districts (PUDs). The circuit court allowed these motions on May 26, 1982, and the parties filed an amended consolidated complaint on July 13, 1982.

Although the procedure placed among the defendants some who deny the validity of the agreement, specifically the PUDs, no question is raised about this procedure. Rather than refer to the parties as plaintiffs and defendants, we ordinarily shall refer to WPPSS as the main proponent of the Participants' Agreements, joined in part by the cities of Springfield, McMinnville, and Milton-Freewater, and to the opponents respectively as the ratepayers, the cities, and the districts or PUDs.

The ratepayers and some of the cities contend that they lack charter authority to enter into the agreements and that special statutory procedures were the exclusive means for joining with others in financing generating facilities. They also contend that by promising unconditionally to pay a share of the project costs whether or not they received any electricity in return the cities incurred debts that may only be incurred by charter amendments or other consent of their qualified voters, and that they unconstitutionally invested in or lent their credit to WPPSS. Finally, they attack the agreements as unlawfully delegating the authority of city officials over electric rates by committing future rates to cover whatever payments would be required under the agreements.

The cities of Springfield, Milton-Freewater, and McMinnville deny these contentions. Among other arguments they maintain that the Participants' Agreements imposed no obligation on the participants to pay for construction costs, or debt service on such costs, if the projects were terminated before commencing operation, as WNP 4 and 5 in fact were. The actual legal consequences of the termination are not before us in this litigation, because the plaintiffs sued for a declaration that the Participants' Agreements were unlawful when they were made.

The PUDs argue that the obligations assumed in the Participants' Agreements constituted long-term indebtedness of the PUDs equivalent to revenue bonds and could be accomplished only with approval by the PUD's qualified voters. Like the other opponents, the PUDs contend that they could join with others in financing the projects only under statutes that were not followed, that they lacked authority to guarantee the debts of other entities such as WPPSS, that the agreements were an unconstitutional investment or lending of credit, and that the agreements unlawfully delegated their authority over their operations and electric rates. They also claim that the agreements were void as being against the public policies represented by these legal restrictions.

The proponents reject all attacks on the transactions, maintaining that the agreements were purchase contracts within the ordinary legal authority of the cities and PUDs. They contend in turn that plaintiffs' claims should have been dismissed as barred by laches or by estoppel.

The logical sequence is to take up, first, a challenge to the timing of the plaintiffs' action; then issues of the cities' and districts' authority, then limitations on that authority found in their charters or in statutes, and finally constitutional limitations. In this instance, issues common to all parties will precede some arguments that depend on separate provisions governing different participants. Because the court is in disagreement on the analysis of the timing issue, that discussion appears at the end of the opinion.

Each of the substantive positions has been exhaustively briefed and argued with great ability and, taken individually, with much persuasive force. The briefs and supplements total 1,513 pages without conspicuous waste, and an opinion responding to each argument in detail would threaten to become nearly as long.

The major arguments, however, have a common theme. There is no important disagreement about the facts. There is substantial agreement about much of the governing law. Some

contentions do not require extensive discussion. For these reasons we shall not discuss all the decisions and other informative sources that have been cited. The major arguments hinge on characterizing the agreements by which the participants undertook to reimburse WPPSS from their power revenues for the costs of financing, building, and operating two nuclear power plants in return for a share of whatever electric power, if any, those plants would deliver to the region's distribution grid.

The proponents contend that the agreements are what they purport to be; contracts to assure the participating utilities of a share of future thermal power generation that WPPSS would undertake to produce, contracts executed with the recognition that the undertaking might fail but that it could not be attempted unless the contracts covered the costs of an unsuccessful attempt. The opponents describe the agreements as an attempt to disguise substance by form, a poorly camouflaged effort to obtain revenue financing of the proposed plants by the participants while circumventing the voting procedures and debt limitations by which statutes, charters, and constitutions seek to guard against such fiscal folly. The proponents insist that it is perfectly proper to structure transactions within legally available forms and that these forms must remain reliable under the stress of failure.

Certainly these transactions were designed and piloted on their way with every effort to stay in an apparently open channel among the legal shoals; they had to be, to reach the financial markets. But the opponents contend that the design, whether born of excess optimism or of desperation, actually sank at its launching.

For the reasons that follow we hold that the local officials who entered into the challenged agreements in 1976 had legal authority to do so, and that in doing so they did not violate constitutional or other legal prohibitions. We therefore reverse the circuit court. This proceeding involves no question of the legal consequences and present enforceability of the agreements in the light of developments after the agreements were executed, and we express no view thereon.

II. THE PARTICIPANTS' AGREEMENTS

The Washington Public Power Supply System, organized in 1957, is a municipal corporation and a "joint operating agency" under Washington law. RCW 43.52. It is an association of 19 Washington public utility districts and four Washington cities. Its role in financing facilities to generate power for distribution by nonmembers grew from the search by the federal Bonneville Power Administration and the region's utilities, through such planning groups as the Public Power Council and the Pacific Northwest Utilities Conference Committee, for ways to meet the region's expected future power needs by means other than the federal appropriations that built most of the large hydroelectric projects from the 1930s to the 1950s.

Under one such arrangement, WPPSS financed and owns the region's first major thermal generating plant, a nuclear reactor at Hanford, Washington, that was authorized by Congress in 1960 and completed in 1966. The projected output of the Hanford reactor was integrated into the Bonneville system by assuring participating utilities of firm power from BPA in return for their shares of the Hanford output, whether or not the Hanford project in fact produced any power. BPA promoted the construction of additional generating plants in various ways. One of these was the device of "net billing," by which utilities financing the plants would assign their share of the generating capacity to BPA in exchange for credits on hydroelectric power purchases from BPA. Because this arrangement assured that the utility would receive BPA power to the amount of payments so credited, BPA in effect assumed the risk that the generating capacity assigned to it would fall below expectations. This device was used for the Trojan nuclear power plant at Rainier, Oregon, and for three earlier WPPSS plants. Washington Nuclear Projects (WNP) 1, 2, and 3. BPA withdrew the "net billing" device for the two projects, WNP 4 and 5, that are involved in the present litigation. BPA nevertheless encouraged its "public power preference" customers to go forward with WNP 4 and 5, predicting a deficiency in

ers to go forward with WNP 4 and 5, predicting a deficiency in federally generated power for their needs, but BPA did not offer protection against the possible failure of these projects corresponding to the earlier arrangements.[1]

In order to finance projects WNP 4 and 5, WPPSS executed five sets of contracts. Those relevant to the present issues are the Participants' Agreements and a bond resolution for the sale of bonds to investors which is incorporated in the Participants' Agreements. There also is an agreement for assigning to WPPSS for resale any power that a participant might not use, an agreement for acquisition by Pacific Power and Light Company of a 10 percent undivided ownership share in project 5, and an agreement for short term sales of power to certain industries.

A number of the disputed issues depend on how the Participants' Agreements are characterized.

The agreements themselves are written as contracts for the sale of shares of "project capability," a phrase which in turn is defined to mean "amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time." Under the terms of the Participants' Agreements, WPPSS undertook the financing, design, construction, operation, maintenance, and eventual termination of the power plants, to issue and service bonds for that purpose, and to deliver power from the plants to the federal transmission grid for the account of each participant. The participants, in turn, promised to pay proportionate shares of the costs of constructing, operating, and terminating the two projects, whether or not they received any power from them. Each agreement went into effect only when agreements allocating 100 percent of the projects' capability and costs were executed. An "Official

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[1] This background is set out in greater detail in several sources. *See* Hittle, *et al., Pacific Northwest Power Generation, Multi-Purpose Use of the Columbia River, and Regional Energy Legislation: An Overview,* 10 Env.L. 235, 245-250, 262-274 (1980); Foote, Larsen and Maddox, *Bonneville Power Administration: Northwest Power Broker,* 6 Env.L. 831, 839-852 (1976); *Natural Resources Defense Council v. Hodel,* 435 F.Supp. 590 (1977); *Chemical Bank v. Wash. Pub. Power Sup. System,* 99 Wash.2d 772, 666 P.2d 329 (1983); *Asson v. City of Burley,* 105 Idaho 432, 670 P.2d 839 (1983).

Statement" issued by WPPSS in marketing its bonds summarized the agreement as follows:

> "Each Participant is obligated to pay the Supply System its share of the total annual cost of the Projects, including debt services on the Bonds . . . whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output."

Certain other provisions of the Participants' Agreements are important. Participants undertook to make payments only from electric utility revenues; in turn, each promised to maintain electric rates high enough to cover its payment to WPPSS along with its other obligations.[2] A participant's share could increase as much as 25 percent if another participant of the same type were to default. This step-up clause was designed to cover possible gaps in financing.[3] The agreements provide for

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[2] Section 6(c):

"No Participant which is a statutory preference customer of Bonneville shall be required to make any payments to Supply System under this Agreement except from the revenues derived by such Participant from the ownership and operation of its electric utility properties. Such Participant covenants and agrees that it will establish, maintain and collect rates or charges for power and energy and other services, facilities and commodities sold, furnished or supplied by it through any of its electric utility properties which shall be adequate to provide revenues sufficient to enable the Participant to make the payments to be made by it to Supply System under this Agreement and to pay all other charges and obligations payable from or constituting a charge and lien upon such revenues."

[3] Section 17(c):

"If the Participant is a municipal corporation, upon default on the part of any other such Participant(s) which is a municipal corporation the Participant's Share shall be automatically increased for the remaining term of this Agreement pro rata with that of other such nondefaulting Participant(s) to the extent that such defaulting Participant(s) fails or refuses for any reason to perform its obligations under its Participants' Agreement, and the Participant's Share of such defaulting Participant(s) shall be reduced correspondingly; *provided,* that the sum of all such increases for the Participant pursuant to this Subsection shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share."

election of a Participants' Committee with powers to review proposals of WPPSS on specified subjects and, in case of disapproval, to submit the matter to a Project Consultant.

By its Bond Resolution 890, WPPSS authorized issuance of revenue bonds to finance the construction of WNP 4 and 5. The resolution covenanted that WPPSS would collect revenues from charges for power, "including capability," sufficient to service the bonds and that it would not rescind or amend the participants' obligations or payments. Chemical Bank was named as the bond fund trustee and empowered to enforce the agreements. A provision of the Participants' Agreement, in turn, "recognized" that WPPSS was bound to comply with the Bond Resolution, among other regulatory and contractual obligations, and provided that "this Agreement is made . . . subject to the terms and provisions of . . . the Bond Resolution" and regulatory requirements.

In short, the transactions were designed so that WPPSS could raise the capital needed to build two nuclear power plants by assuring that 100 percent of the costs would be recovered through irrevocable contracts with distributing utilities, which agreed to maintain their own rates high enough to meet those costs but were not obliged to meet them from any other source of funds.

At the time of this litigation, WPPSS had terminated the projects after raising and spending several billion dollars toward their construction, when accumulating costs and marketability of power at the resulting prices proved vastly different from the initial assumptions. These events, however, do not bear on the issues before the court, apart from illustrating the risk that was present from the beginning.

The question whether the cities and PUDs had authority to enter the transaction will not be judged by hindsight. That question is important beyond this case and will remain important for the future ability of the cities and districts to serve their communities, unless their authority is changed by law. It will not be decided with a view to the fate of WPPSS projects and

its consequences. The answer must be the same as if the project still promised to deliver power at reasonable cost, and the cities and PUDs were defending their participation against a challenge, for instance, by opponents of nuclear power seeking to attack the legal basis for the projects.

III. NONCOMPLIANCE WITH STATUTES

On two occasions, the Legislative Assembly responded to the concern of cities and PUDs by providing new statutes under which these public entities might join others in securing the thermal generating capacity that federal agencies could not provide. It enacted the Thermal Power Facilities Act (TPFA), Or. Laws 1967 ch. 603, and the Joint Operating Agency Act, Or. Laws 1973 ch. 722. The cities and PUDs did not use either of these statutes in their agreements to purchase "power capability."[4] The parties dispute whether failure to follow these statutes is fatal to the agreements, either because there is no other authority to participate in the kind of projects undertaken here, or because the specific statutory provisions displace whatever authority otherwise might exist.

The Thermal Power Facilities Act, codified with respect to cities in ORS 225.450-225.490 and with respect to PUDs in ORS 261.235-261.255, declared it to be in the public interest that cities, districts, electric cooperatives, and electric utility companies "participate as authorized in [the act]" to achieve economies of scale and to meet future power needs. ORS 225.460, ORS 261.240. The same sections direct that the act be "construed liberally" to effectuate those purposes. The act provides that "[i]n addition to the powers otherwise conferred" on cities and on districts respectively, each "may plan, finance, construct, acquire, operate, own and maintain an undivided

[4] The cities also did not make use of the authority given cities in ORS 225.060 "either severally or in joint agreement [to] purchase, own, operate and maintain any works in an adjoining state necessary or pertinent to the furnishing of electric power. . . ."

interest in common facilities" jointly with other utilities or any combination thereof, "and may make such plans and enter into such contracts and agreements as are necessary or appropriate for such joint planning, financing, construction, acquisition, ownership or maintenance." ORS 225.470, ORS 261.245. When proceeding under the act, each city or district "shall be liable only for its own acts," and no money contributed by it may be credited to another participant. ORS 225.480, ORS 261.250. Each may "furnish money and provide property" and sell revenue bonds "pledging revenues of its electric system and its interest or share of the revenues derived from the common facilities . . . in order to pay its respective share of the cost" thereof. ORS 225.490, ORS 261.255.

The opponents point to enactment of this statute to show that prior to 1967 the cities and PUDs lacked authority to join with others in combined transactions of the kind before us. The testimony they quote from the legislative history shows that some witnesses doubted that such authority existed, and legislators may have shared those doubts. But that cannot be used to show what the prior state of the law actually was. The views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors. Moreover, witnesses and legislators alike would know that legal doubts alone could prove fatal to successful participation in any financing plan, however lawful it actually might be. It is perfectly sensible to meet such doubts by providing the desired statutory authority, whatever the prior authority might cover. TPFA's use of parallel provisions for the cities and the districts further demonstrates that the purpose was to provide each with assured authorization "[i]n addition to the powers otherwise conferred," for these powers are not otherwise identical.

The 1967 act shows that the legislators wanted Oregon cities and PUDs to be able to join with others in planning, financing, building, operating, and owning common facilities, and that they wanted this authority to be "construed liberally." ORS 225.460, ORS 261.240. The act also shows that they

wanted each city and district to be liable only for its own share, and that if it needed to issue revenue bonds, this would require the normal procedures prescribed in the city charter, ORS 225.490, and the PUD statutes, ORS 261.255, 261.355. Except for these constraints, the language of the TPFA is the language of authorization, not of limitation. We do not read the stated public policy that the cities and districts "participate as authorized" in the act to mean "only as authorized" therein. We are not persuaded that the TPFA was meant to supersede other powers available to cities or PUDs.

The second statute, the Joint Operating Agency Act, enacted in 1973, is codified in ORS 262.005—262.115. It authorizes three or more Oregon cities or PUDs to form a "joint operating agency to plan, acquire, construct, own, operate and otherwise promote the development of utility properties in this state for the generation and transmission of electric power and energy," and to join with other entities for that purpose, and it authorizes such a joint operating agency to participate in joint ownership of thermal plants in accordance with the TPFA. ORS 262.015. Given the TPFA, this second act clearly is supplemental, not exclusive, authority. The only claim made for it is that, along with the TPFA, it represents a legislative "offer" of otherwise nonexistent "extramural" authority to the municipalities, an issue dealt with later in this opinion.

We conclude that if the cities and PUDs otherwise had authority to enter the agreements challenged in this litigation, enactment of the two statutes did not supersede that authority or restrict it, except for the policy against financing another participant's share that is expressed in ORS 225.480 and ORS 261.245.

IV. APPLICABILITY OF BOND PROCEDURES

The opponents attack the Participants' Agreements for failing to comply with provisions in charters, statutes, and the constitution that impose procedural rules and substantive limits on incurring public debts. Some of these rules relate specifically to the issuance of bonds.

If the PUDs or the cities themselves had issued revenue bonds, they would have had to obtain the approval of their respective voters, the PUDs by virtue of ORS 261.305(6), ORS 261.355 and ORS 261.375(1), the cities by virtue of charter

provisions. Of course, the PUDs and cities did not issue bonds, WPPSS did. The opponents argue, however, that the obligations incurred in executing the Participants' Agreements were the equivalent of revenue bonds and therefore required voter approval. The argument is stated in several ways. The participants' payments to WPPSS retire a debt incurred by WPPSS on their behalf which they have the sole responsibility to repay; therefore the participants must "treat this bonded obligation as their own." Construction of the projects by WPPSS on the strength of the participants' unconditional obligations to pay the costs was a "scheme" or "artifice" designed to circumvent voting requirements and other legal constraints. WPPSS, the opponents say, is only a "conduit" between the participants and the bondholders.

These descriptions do not make entirely clear whether the argument is that the participants are the true debtors of the bondholders and the bonds issued by WPPSS are really their bonds, or rather that the Participants' Agreements, by "pledging" future power revenues to pay all costs incurred by WPPSS, themselves constitute "bonds" issued to WPPSS. The opponents do not claim that either statement is literally true. The participants did not incur direct debts to the holders of WPPSS bonds, though their unconditional promises to pay the total costs of WNP 4 and 5 were the only source from which WPPSS would pay those bonds. Likewise, the participants borrowed no money from WPPSS that they promised to return with interest; what they expected to get for their future payments was electric power, expressed as a share in the generating capability of the projects. But the opponents claim that in substance, if not in form, the transactions were the same as issues of revenue bonds by the PUDs and cities themselves.

To support their claim that the court should look through the legal form to the economic substance of the transaction, the opponents rely on *Martin v. Oregon Building Authority*, 276 Or. 135, 544 P.2d 126 (1976). That case arose upon special statutory review of the constitutionality of an act creating a building authority as a means to buy or construct buildings with

revenue bond financing for lease to state agencies, and the court invalidated the act as an attempt to "create any debt or liability" exceeding $50,000 in a manner forbidden by Article XI, section 7, of the constitution. To show how the court reached that conclusion, we review the case in some detail.

The law at issue in *Martin* created the Oregon Building Authority as an "independent public body politic and corporate" for the purpose of developing "necessary facilities" for the state at an advantageous cost. The building authority's board of directors was composed of the State Treasurer, the Attorney General, and the Director of the Department of General Services. The building authority was empowered to finance the acquisition of buildings for lease or sale to state agencies by issuing notes and bonds which were to be payable solely from the building authority's revenues or other assets and expressly were not to be a "debt or liability of the state." Revenues obtained from leasing or selling buildings to the state would be pledged as security for payment of the bonds and channeled through a trust fund administered by an independent trustee. At the time of the litigation, the board of directors had adopted resolutions for the issuance of bonds to finance seven projects, including the construction of new wings for the capitol. Each was to be leased to the state under leases which fixed the rent at the amount of debt service on the bonds plus the building authority's operating expenses. The court found that the state's obligation to pay rent was unconditional and "supported by the state's full faith and credit." 276 Or. at 138-139, 554 P.2d 126. The rentals were assigned to the trustee or trustees for the benefit of the bondholders.

Justice Holman's opinion for the court began by reviewing the origins of constitutional debt limitations in the 19th century in response to excessive government borrowing, primarily for transportation facilities, which often led to defaults. The opinion then stated:

> "It is generally agreed that in imposing debt limitations, 'the predominant purpose was the achievement of a high degree of control over debt creation in order to

> forestall irresponsibly imposed tax burdens * * *.' The Oregon cases have stated that our provision 'was adopted by the people as a protection against burdensome and excessive taxation' and that it was intended 'to prevent exposing the sources of public revenue to potential hazard.' Long-term obligations create a fixed charge against future revenues and can impair the flexibility of planning and the ability of future legislatures to avoid a tax increase. Debt restrictions force the elected representatives of the people to operate the government within its means and remove the temptation to undertake projects on an enjoy-now, pay-later basis."

276 Or. at 141, 554 P.2d 126 (footnotes omitted). The opinion observed that building authorities were a controversial device to skirt debt limitations, though they had been upheld in a majority of cases in other states. To sustain the Oregon Building Authority would depend on finding that neither the authority's bonds nor the state's leases were debts within the constitutional prohibition.

The court noted that the bonds might escape the prohibition if the issuer were truly independent of the state, or if they were revenue bonds even if the issuer was considered a state agency. The revenue which was pledged to support these bonds, however, was future government rents payable from funds raised by taxation. As to independence from the state, the court thought the status of the building authority comparable to that of the university regents in *McClain v. Regents of the University,* 124 Or. 629, 265 P. 412 (1928), whose dormitory construction bonds had escaped the debt limitation only because they were revenue bonds. The building authority, the court noted, "is managed and controlled by state officers, it must report periodically to the Governor and must obtain legislative approval for certain of its actions, and it is maintained largely by public funds. Its sole purpose is to implement the building policies of the state." The main difference from the university regents was the legislature's description of the authority as an "independent body." 276 Or. at 144, 554 P.2d 126.

The court concluded that when the transactions were viewed as a whole, the separate existence of the building

authority must be disregarded. It reached this conclusion in essence because the building authority had no purpose other than to borrow money, because its income was assigned to trustees, because the state was its only possible tenant, because the authority had no other use for the structures it financed, and because the leases delegated responsibility for handling construction of the authority's projects to the state. 276 Or. at 144-145, 147, 554 P.2d 126.[5] The court therefore described the building authority as a "gutless intermediary" whose sole function was to insulate the actual relationship between the bondholders and the state from the constitutional debt limitation, and it summarized its holding to be "that for constitutional purposes we are going to look through the dummy corporation and that the bonds are the debts of the state." 276 Or. at 145, 147, 554 P.2d 126.

Although the issue presently under discussion is not debt limitation but voting requirements, the opponents of the Participants' Agreements argue that the similarities of the financing arrangements in this case to those in *Martin* equally require us to disregard the separate existence of WPPSS and to treat the bonds issued by WPPSS as the participants' bonds. The economic similarities are great. In both cases, unconditional commitments of governmental customers to pay for future services were used by bond issuers to finance facilities for the exclusive benefit of those customers; the amount of future payments was tied to the costs of financing the projects; and those payments were the only source of repayment for financing the acquisition, construction, and operation of the projects. In both cases, also, the transactions were designed to avoid borrowing by the governmental users by having a supplier rather than the user borrow the needed funds on the strength of long-term user agreements covering the entire cost of the projects.

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[5] The issue of financing state buildings by long-term leases in *Martin* was complicated by the fact that Or. Const. Art. XI, § 7 was amended in 1964 to except such leases from the debt limitation. The court, and Justice O'Connell, concurring, found the exception inapplicable because the lease payments to the building authority were pegged to recovery of costs, not to fair rental value. 276 Or. at 150-158, 554 P.2d 126.

The differences between the Oregon Building Authority and WPPSS are equally obvious. The building authority was created by the state government solely as an instrumentality to finance its own need for buildings. It was directed by a board composed of the chief legal, financial and property management officials of the state govenrment. Whatever the building authority act meant by the phrase "independent public body politic and corporate," such a board could no more be a "body politic" divorced from state government than, for instance, the State Land Board composed of the Governor, Treasurer and Secretary of State.[6] WPPSS is not a creation of the Oregon participants in WNP 4 and 5, or of all the 88 participants in those projects; as stated above, it was organized under Washington law in 1957 as a statutory municipal corporation and joint operating agency of 19 Washington public utility districts and three Washington cities. WPPSS is not "managed and controlled" by officers of the government with which it contracted, as the *Martin* court observed of the building authority. Moreover, WPPSS did not, like the building authority, delegate to the user agencies the responsibility for construction of the projects it would finance for them.

Again, it must be remembered that the present discussion does not concern the question whether the Oregon participants incurred "debts," but whether the participants are the actual—and unauthorized—issuers of the bonds sold to finance WNP 4 and 5 because the separate existence and role of WPPSS should be disregarded like that of the building authority in *Martin*. On this question the economic similarity of the financing devices is not decisive. The commitment of an agency's long-term contract as security, even as the sole security, for financing a building, a power plant, or another source of supply dedicated to the agency's use does not turn WPPSS or any otherwise independent supplier into a "dummy corporation" of the contracting agency. WPPSS was used as the vehicle for building thermal generating projects for the participants precisely because it already had an independent existence and bonding capacity. The *Martin* decision does not support a holding that would disregard this independent existence of WPPSS as the issuer of its bonds.

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[6] *See* Or. Const.Art. VIII, § 5; ORS 273.031.

V. DEBT LIMITATIONS

The Participants' Agreements obligate each participant to make its contractual payments to WPPSS whether or not the projects are completed and whether or not they produce electric power. These payments, however, are to be made only from the participant's revenues derived from the operation of its electric utility properties.[7] The parties dispute whether the obligations are debts or indebtedness, as those terms are used in the various laws applicable to such debts, or escape these laws because they are payable only from electric power revenues. The arguments concerning the cities differ from those concerning the PUDs and we deal with each separately.

The issue whether the cities' unconditional commitments to WPPSS constitute debts arises under the individual city charters. When cities were incorporated by individual legislative acts, Article XI, section 5 of the Oregon Constitution required such acts incorporating cities to "restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." One city, Springfield, still has a statutory charter; the others adopted their own charters after Article XI, section 2, shifted that function from the legislature to the cities them-

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[7] In addition to section 6(c), footnote 2, *supra,* section 6(d) provides:

> "The Participant shall make the payments to be made to Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy."

selves.[8] Each has a debt limitation in its charter, but they are not identical.[9]

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[8] One statute relating to municipal bond issues, ORS 287.004, generally limits a city's outstanding bonds to three percent of its property tax base but excepts bonds issued for "power" purposes (presumably electric power) among others. The same section expressly requires voter approval for city bond issues only when required by the city charter or by another statute.

[9] Springfield Charter, Art VII, § 54:

"The common council of said city shall not in any way create any debts or liabilities which shall singly or in the aggregate exceed the sum of $500.00, except as in this charter otherwise specifically provided."

McMinnville Charter, ch XI, sec 64:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $100,000.00 at any one time. . . ."

Milton-Freewater Charter, ch X, sec 2:

"Except by the consent of the voters the voluntary floating or warranted indebtedness of the city for general purposes shall not exceed $25,000.00 at any one time provided, that the legally authorized debt of the municipalities of Milton or Freewater existent at the time of the adoption of this Charter shall not be included in such indebtedness for purposes of calculating the limitation."

Drain Charter, ch XII, sec 1:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $25,000.00; not its bonded indebtedness $250,000.00 at any one time. Bonded indebtedness to be by amendment to charter. . . ."

Canby Charter, ch XII, sec 1:

"Except for bonds heretofore or hereafter authorized, the City's voluntary floating indebtedness shall not exceed $25,000.00. For the purposes of calculating the limitation, however, the legally authorized debt of the City in existence at the time this Charter takes effect shall not be considered, and all bonds of the City heretofore issued and unpaid at the time this Charter takes effect shall remain and continue to be the obligation of the City of Canby until the same are paid. . . ."

Cascade Locks Charter, ch X, sec 40:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $2,500.00; nor its bonded indebtedness, $5,000.00 at any one time. . . ."

Bandon Charter, Art IX, sec 34 (1940):

It should be understood that the meaning of a charter debt limitation, as the meaning of any other charter provision, is an individual matter for each city. The adoption of a debt limitation, by charter or otherwise, is local legislation, to be

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"Unless otherwise authorized by the legal voters of the City of Bandon at a special election duly called and held for such purpose, the council shall not contract a voluntary floating indebtedness of said city in excess of the sum of $500.00 for general city purposes and the council shall not contract an indebtedness in excess of the sum of $1,500.00 for the maintenance and operation of its municipal utilities; no warrants shall be authorized by the council, nor be issued unless there is cash in the city treasury available for the payment of such warrant.

"Members of the city council, or any other city official or public employee, who shall authorize, incur, cause or create, or officially approve any such indebtedness in excess of said limitation, shall be jointly and severally liable, individually and personally, for the amount of such excess."

(This section was removed when the City of Bandon amended its charter in 1981.)

The charters of the cities of Drain, McMinnville, Cascade Locks and Canby also state:

"All city officials and employees who create or officially approve any indebtedness in excess of this limitation shall be jointly and severally liable for the excess."

Charters of the cities of Drain and Cascade Locks also provide:

"For purposes of calculating the limitation, however, the legally authorized debt of the city at the time this charter takes effect shall not be considered."

The McMinnville Charter contains the same provision, without the language "at the time this charter takes effect."

Under the Canby and McMinnville charters, the ordinary charter debt limitations do not apply, respectively, to revenue bonds of the Canby Utility Board and to warrants of McMinnville Water and Light Commission. Instead, the Canby Utility Board's authority to "borrow money" for up to five years is limited to a stated percentage of revenue or plant value, Canby Charter ch XIII, §4(1). Similarly, the Springfield Utility Board's power "to borrow money either by the issuance of notes or bonds secured only by a pledge of [utility] revenues" is limited to 25 percent of the utility's original cost and to stated purposes. By their terms these provisions do not apply here, once the argument that the participants are the "borrowers" under bonds issued by WPPSS is rejected.

interpreted by the same means as other legislation, including attention to the meaning intended by those who adopted it if that can be ascertained. It is not a matter of common law, to be resolved by consulting caselaw or encyclopedic summaries of caselaw. *Cf. Anderson v. Peden,* 284 Or. 313, 315-316, 587 P.2d 59 (1978) (concerning the meaning of "conditional use" in zoning ordinances). A city can write its charter or ordinance to define for itself the amount, character, or purposes of indebtedness that it means to limit. Not only can cities choose different words; legislative history may show that cities, like state legislatures, meant different things by the same words.

It therefore is not conclusive that cases have held indebtedness under various charter provisions to include long-term contracts or to exclude obligations payable from "special funds." In the absence of statute, a city can design its debt limitation to exclude payments due for goods and services as distinct from borrowed money, or to include debts payable from non-tax revenues.[10] Under the "home rule" powers of Article XI, section 2 of the Oregon Constitution, these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines.

This does not mean that past judicial opinions are irrelevant in interpreting a particular provision. Given the ingrained tendency to copy conventional texts, though obscure, rather than seek clarity by new ones, charter debt limitations may well have been adopted and later repeated in the belief that they meant whatever courts or McQuillin had said of such provisions generally.[11] As early as 1873, for instance, this court held that a 17-year contract to purchase water at a fixed rate created an immediate indebtedness for the total, aggregate purchase price. *Salem Water Co. v. City of Salem,* 5. Or. 29 (1873), *see also Brewster v. Deschutes County,* 137 Or. 100, 1 P.2d 607 (1931). The assumption that present charter provisions accept that

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[10] *See* ORS 287.004, *supra* n. 12.

[11] *See* 5 McQuillin § 2232 (1913, 1st ed) stating that long-term contracts are debt and 5 McQuillin § 2228 (1913, 1st ed) (payments from "special funds" are not debt).

interpretation of indebtedness might be overcome by showing a different intention, but no such showing has been attempted in this case. WPPSS invites us to reconsider this "aggregation rule," citing a reference to that possibility in *Terry v. Multnomah County,* 279 Or. 127, 136, 138, 566 P.2d 878 (1977). But, as already stated, that view of long-term contracts is not properly a judicial rule but judicial interpretation of state or local laws, and it can be modified at will by amending the laws.

For present purposes we accept the opponents' assertion that the cities' financial commitments to WPPSS would qualify as indebtedness within these cities' respective charters if they were payable from general funds. The question is whether the charter limitations exclude debts payable only from electric utility revenues under the interpretation of debt limitations generally known as the "special fund doctrine."

We note that this "doctrine," too, is not a judicial rule of law but judicial interpretation of provisions found in various statutes, charters, and the constitution. Again, however, it is an interpretation that early was recognized in Oregon, *see, e.g., Brockway v. Roseburg,* 46 Or. 77, 79 P.355 (1905), *Eaton v. Mimnaugh* 43 Or. 465, 73 P.754 (1903), *Avery v. Job,* 25 Or. 512, 36 P.293 (1894), and we are offered no evidence that any of the provisions relied upon in this case were differently intended or in practice have been thought to include debts payable from non-tax revenues.

The proponents rely on this court's statements of the doctrine in *Butler v. City of Ashland,* 113 Or. 174, 232 P.655 (1925), which involved a city's contract to buy water from an irrigation district. The city expected to pay for the water by issuing notes exceeding the amount of debt allowed by its charter, and the contract originally was made contingent on approval of a charter amendment by the voters. When the city found that it could meet the cost from accumulated and expected revenues from the sale of water, the contract was changed to substitute "certificates of indebtedness" payable exclusively from those revenues, and no authorizing election was held. The court declined to enjoin issuance of the

certificates of indebtedness as a violation of the charter. It wrote:

> "The authorities are well-nigh unanimous, that where a contract creating an indebtedness provides for a special fund with which to meet the indebtedness as the same accrues, and no general liability is thereby created against the municipality, such an indebtedness is not within the constitutional inhibition against creating a debt in excess of a fixed amount. . . ."[12]

> "The language of the special obligation note limits the liability of the city to the water revenues. The special obligation notes, therefore, do not constitute an indebtedness against the city within the meaning of Article XI, Section 5, of the Constitution of Oregon."

113 Or. at 182-183.

Subsequent decisions have repeated this view of debt limitations, making their application turn on the potential exposure of general tax revenues. *Compare, e.g., Walsh Const. Co. v. Smith*, 272 Or. 398, 404, 537 P.2d 542 (1975) (housing bonds payable from rents held to be outside debt limitation despite a "moral make-up clause"); *Morris v. City of Salem*, 179 Or. 666, 174 P.2d 192 (1946) (same for contract to purchase parking meters payable only from meter revenues), *McClain v. Regents of the University, supra*, (same for dormitory bonds payable only from rental income), with *Public Market Co. v. City of Portland*, 171 Or. 522, 130 P.2d 624, 138 P.2d 916 (1943) (lack of revenue source to repay "utility certificates" would violate debt limitation), *Rorick v. Dailes*

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[12] The court cited 5 McQuillin, Municipal Corporations, §§ 2227, 2228, and 2230, and the following cases as having approved the principles stated in those sections: *Morris v. City of Sheridan*, 86 Or. 224, 233, 167 p. 593 (1946); *Smith v. Jefferson*, 75 Or. 179, 146 P. 809 (1915); *City of Joseph v. Joseph Water Works Co.*, 57 Or. 586, 111 P. 864, 112 P. 1083 (1910); *Kadderly v. Portland*, 44 Or. 118, 151, 74 P. 710, 75 P. 222 (1903); *Little v. City of Portland*, 26 Or. 235, 246, 37 P. 911 (1894).

City, 140 Or. 342, 12 P.2d 762 (1932) (held to be within the debt limitation because of partial exposure of general funds beyond tolls collected from toll bridge).

We repeat that the exposure of tax revenues is not an inescapable definition of indebtedness. A public entity's financial obligations payable from its operating assets, like those in *Butler* or in the other cases cited above, may have all the ordinary characteristics of debt of a private entity engaged in a similar operation, and charters or other laws may choose how such debt should be incurred or restricted. The uniform interpretation given existing laws, however, is of long standing. The cities and their ratepayers do not claim that the special fund doctrine, as previously understood in Oregon, does not apply to their respective cities, but they claim that it does not apply to the obligations imposed by the Participants' Agreements.

They seek to distinguish the decisions applying the doctrine by arguing that none of those decisions involved obligations with all the features of the present agreements. They observe that the cities' financial obligations towards WPPSS are not for projects owned or controlled by the cities, do not depend on actual receipt of any benefit (in this case electricity), are not self-liquidating, are not finite in amount or in the rates committed to paying them, and obligate revenues that are paid by substantially all residents for an essential service. They maintain that these characteristics should take the contracts beyond the limits of the "special fund" exception. The proponents respond that characteristics which individually do not create a debt under the charters also cannot cumulate so as to create a debt.

None of the listed characteristics places a transaction outside the "special fund" rule. This court's older decisions did not confine that concept to self-liquidating projects but used the term also to refer to assessments levied for specific projects that generated no revenue, such as a courthouse, *Dougan Co. v. Klamath County*, 99 Or. 436, 193 P.645 (1920), a jail, *Wingate v. Clatsop County*, 71 Or. 94, 142 P.561 (1914), and roads and

streets. *Morris v. City of Sheridan,* 86 Or. 224, 167 P.593 (1917), *Bowers v. Neil,* 64 Or. 104, 128 P.433 (1912), *Kadderly v. Portland,* 44 Or. 118, 74 P.710, 75 P.222 (1903), *Little v. City of Portland,* 26 Or. 235, 246, 37 P.911 (1894). Also, the persons who provide the "special fund" need not be direct beneficiaries of the expenditure; indeed, there need not be any quid pro quo. In *Moses v. Meier,* 148 Or. 185, 35 P.2d 981 (1934), the court applied the doctrine to an unemployment relief fund payable from liquor control revenues. The opponents observe that *Moses v. Meier* was litigated as a "friendly" proceeding and perhaps turned on the court's desire to uphold the laudable purpose for which the liquor control funds were exacted in the first place. Nonetheless, the source of the funds, not the purpose to which they were put, explains the decision that they escaped the constitutional restriction on state debt.

Against the position emerging from these cases, opponents argue forcefully that a debt limitation confined to commitments of tax revenues cannot prevent state or local officials from entering speculative or ill-considered undertakings without the prior consent of their constituents. That is true; in hindsight, the present contracts are an example. The law of debt limitations in general and the special fund doctrine in particular have had their share of criticism; upon a fresh start in the light of experience one might draw the lines differently. But the argument presents a task for lawmakers; it comes too late for judges. As recently as 1976, Justice Holman's opinion in *Martin v. Oregon Building Authority supra,* reiterated that the predominant purpose of debt limitations was to forestall irresponsibly imposed tax burdens, to protect against "burdensome and excessive taxation," *McClain v. Regents of the University,* 124 Or. at 634, to "prevent exposing the sources of public revenue to potential hazard," *Carruthers v. Port of Astoria,* 249 Or. 329, 337, 438 P.2d 725 (1968),[13] and to preserve "the ability of future legislatures to avoid a tax increase." 276 Or. at 135. Too many commitments have been made on that understanding to overturn it now, in the absence

[13] "Public revenue," in the *Carruthers* opinion, referred to tax revenue.

of a showing that a particular law or charter provision meant something else. And the interpretation of debt limitations as referring to commitments of tax revenues is defensible. It is not unreasonable to suppose that a community might wish to impose quantitative or procedural restraints on the perennial political urge to spend the next generation's taxes, yet not wish to extend the same restraints to the management of its public service enterprises as long as tax revenues are not obligated.

We do not accept the opponents' argument that utility rates in fact are equivalent to taxes because they have a comparable economic impact on ratepayers. Any charge for a public service reduces the user's disposable funds much as taxes do; that was true of the water charges in *Butler*, the dormitory rents in *McClain*, the bridge tolls in *Rorick*, and the parking meters in *Morris*, each of which was a necessity for some class of users. Charges for these necessities are not inescapable in the same sense as taxes are. This is what makes general obligation debt preferable to creditors, and correspondingly cheaper. At some point it may become too expensive to drive or park a car, to attend a college, to water a lawn; and it also is possible to reduce one's consumption of electricity, to substitute another fuel, or in the case of a plant or institution, perhaps even to generate one's own electricity. If an unforeseen event prices too many users out of the market for the service, the creditor also loses the only source of repayment. In equating a commitment of future rates, expensive as it may prove to be, to a pledge of future taxes, the opponents simply attack the "special fund" premise of this long-established line of decisions in another way.

Nor, finally, do we agree with the contention that the Participants' Agreements in fact expose the cities to general liability. The agreements plainly were intended to exclude any obligation that would bring them within the various debt limitations. That was understood to be essential to their validity, and they must be interpreted accordingly. *Public Market Co. v. Portland*, 171 Or. at 565, 130 P.2d 624, 171 Or. 523, 138 P.2d 916. The agreements expressly negate any

obligation to pay except from the revenues derived from the ownership and operation of a participant's electric utility properties. The exclusion of any broader liability deserves to be taken at face value. *See Carruthers v. Port of Astoria, supra,* 249 Or. at 339-340, 438 P.2d 725.

VI. PROHIBITION OF "STOCKHOLDER" OR "LOANING CREDIT"

The preceding sections have discussed bonding procedures and debt limitations that could be satisfied, if necessary, by putting the intended commitment to the WPPSS projects to a vote of the respective participants' voters. Beyond those issues, the opponents also invoke constitutional limitations which could not be so satisfied but would prevent the cities and districts from entering into these transactions altogether.

Article XI, section 9 or the Oregon Constitution provides:

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association. . . ."[14]

The opponents contend that the participants became "stockholders" in WPPSS and in WNP 4 and 5, that they "raised money" for WPPSS and the projects, that they "loaned their credit" to WPPSS as the security for its bonds, and that, however characterized, the effect of the financing scheme was to create the kind of risks that the constitutional provision was designed to prevent. The proponents respond that WPPSS has no "stock," that the constitutional clause only applies to funds

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[14] The section continues with a proviso adopted in 1917 to allow ports to offer a bonus in aid of water transportation.

Districts are municipal corporations. *In re People's Utility District,* 160 Or. 530, 86 P.2d 460 (1939). The PUDs' brief in this case adopts the arguments of the ratepayers and cities under Art XI, § 9.

invested in or raised for private enterprises, and that, again, it applies only to the use of general tax revenues. Each side relies on passages from past opinions discussing the scope of Article XI, section 9. The proponents quote statements that the clause is directed at using public funds in aid of private corporations, as said in *Carruthers v. Port of Astoria, supra,* 249 Or. at 340, 438 P.2d 725 and *Johnson v. School District No. 1,* 128 Or. 9, 12, 270 Or. 764, 273 P. 386 (1929). *See also Sprague v. Straub,* 252 Or. 507, 511-518, 451 P.2d 49 (1969) (discussing parallel prohibition of article XI, section 6). The opponents quote from the same opinions statements that the targets of the section were "speculation" (*Johnson*) and a "potential hazard" to public revenues, *Carruthers v. Port of Astoria, supra,* at 329, 438 P.2d 725.

These statements, of course, are not inconsistent. No doubt those who drafted the prohibitions had in mind the practice of aiding private enterprise, and the quoted statements were made in that context; the cases did not have to consider speculative investments in securities of enterprises that might not be "private."

The opponents make a good textual argument for the position that the word "corporation," as used in Article XI, was not confined to today's business corporation but included public as well as private corporate entities, and that the phrase "any joint company, corporation or association, whatever" in section nine encompasses an entity such as WPPSS.[15] We also may assume for this argument that the term "stockholder" does not allow evasion by substituting another word to describe a financial investment in such an entity that is neither repayable

[15] The creation and powers of corporations and the liability of their shareholders were controversial topics in the 1857 constitutional convention. They were coupled, significantly enough, with the topic of "internal improvements," meaning economic development. *See* Carey, The Oregon Constitution 147, 232-278. Or. Const. Art. XI, § 2, which provided that "[c]orporations may be formed under general laws, but shall not be created by specific laws, except for municipal purposes," shows the 19th century usage of "corporation" to include municipal as well as business or other private entities.

as a debt nor part ownership of identifiable property. The hypothesis distinguishes the transactions sustained in *Churchill v. Grants Pass*, 70 Or. 283, 141 P.164 (1914) (agreement to build a railroad for lease or sale to private company), and *Security Co. v. Baker*, 39 Or. 396, 65 P.369 (1901) (common ownership of real property with private company). Even on these assumptions, the Participants' Agreement did not make the participants "stockholders" in WPPSS, a statutory entity composed of Washington cities and public utility districts. Nor are we persuaded that the 88 participants themselves formed an "association" in which they held "stock" within the meaning of Article XI, section 9.

Equally unconvincing is the argument that the participants "raised money" for WPPSS; if anything, WPPSS, by selling its revenue bonds, raised money intended to benefit the participants. Of the several prohibitions combined in Article XI, section 9 of the Oregon Constitution, the opponents' most plausible claim is that WPPSS was able to sell its bonds only on the strength of the participants' "loan" of "credit" in the form of their unconditional promises to pay the bills.

Past opinions discussing these constitutional provisions include some cases in which the government became a co-owner of property or borrowed funds to aid a private enterprise in a desired economic development. *See Miles v. City of Eugene*, 252 Or. 528, 451 P.2d 59 (1969) (joint construction of power plant); *Carruthers v. Port of Astoria, supra* (municipal financing of aluminum reduction plant for long-term lease to specified private company); *Hunter v. Roseburg*, 80 Or. 588, 156 P. 267, 157 P. 1065 (1916) (municipal bonds for joint railroad project with railroad company and lumber company). These more properly illustrate "raising money" than "lending credit." By forbidding the state to "lend" and local governments to "loan" their credit, as well as to hold stock in or raise money for a corporation, Article XI covers transactions in which government does not itself raise and transfer funds but places its credit behind the corporation's ability to borrow money or obtain goods on credit. The obvious example is an outright

guarantee made directly to a creditor to pay another's debt. Although the Participants' Agreements with WPPSS are not literally guarantees to the bondholders, the opponents argue that they are the functional equivalent and should be treated as such.

Indisputably WPPSS undertook and was able to sell bonds and begin construction on the strength of the participants' commitments to pay the bills sent by WPPSS as they came due. The transactions were built around those commitments. That might be true of any private project undertaken to satisfy a specific governmental demand and financed on the basis of a long-term lease or contract, at a price tied to the supplier's costs. What makes these agreements into a loan of credit rather than a purchase contract, according to the opponents, is that the participants assumed the "dry hole" risk in section 6(c), *supra* n. 2, which committed them unconditionally to pay all that WPPSS would borrow and spend without assurance of receiving anything in return.

Although this seems to state a plausible distinction between a cost-based purchase contract and a loan of credit, on examination it proves to be doubtful. The argument implies that the agreements would be valid as long as they were contingent upon the delivery of some electricity to the participants, at whatever cost. It is not obvious why the legal character of the transaction should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none. In either event WPPSS would have obtained the necessary funds upon the assurance of the participants' obligations to pay.

But we need not decide whether an unconditional agreement to pay the costs of a speculative source of supply ("project capability") would constitutionally differ from an agreement to buy an unspecified quantity of electric power priced at equally speculative costs, if the agreement involved a general obligation to pay from public funds. This court's past interpretation of Article XI, section 9, as of the other debt limitations, once again has confined the prohibition against loans of credit to those

which expose the government's general credit, that is to say, its taxing power. Thus *Miles v. City of Eugene*, 252 Or. at 531, 451 P.2d 59 cited *McLain, Moses*, and *Carruthers* for the proposition that the "loan of credit" clause "is not a restriction upon the obtaining of funds by a municipality by the sale of revenue bonds, as distinguished from general obligation bonds." The court explained *Carruthers v. Port of Astoria, supra*, as follows:

> "In that case the Port proposed to raise funds by the sale of revenue bonds. With the funds the Port was going to build an aluminum reduction plant, lease it to a private company, and grant the private company an option to purchase the plant at the end of 25 years for a nominal balance. We held that this did not amount to raising money for a private business or loaning credit to, or in aid of, the private company. Likewise, the proposal in this case would not come within the constitutional prohibition against raising money or loaning credit. Money coming from revenue bonds and not from tax money does not fall within the prohibition."

252 Or. at 533-534, 451 P.2d 59. And the *Miles* opinion concluded, at 537, 451 P.2d 59:

> "In this case and in *Carruthers v. Port of Astoria*, supra (249 Or. 329, 438 P.2d 725), the parties attacking the constitutionality of the proposals relied strongly upon *Hunter v. Roseburg*, 80 Or. 588, 156 P.267, 157 P.1065 (1916). That case is distinguishable because in that case the city was proposing to finance the construction of a railroad with general obligation bonds payable from general tax levies."

It may well be that the ban on stockholding, raising money for, or lending credit to corporations aimed to bar favoritism, corruption or other misuse of political institutions to aid particular private enterprises as well as to protect public finances against speculation. Private use of government credit is not the issue in financial transactions among governmental entities like the cities, the districts, and WPPSS. And even if the aim to protect public finances should cover speculative commitments to enterprises whose "private" or "public" character may be

doubtful, the foregoing cases have defined the protected funds to be only tax revenues.

When government engages in public services or activities that generate revenues other than taxes, this court's past decisions have let government commit those revenues to financing its own projects or to support desired private projects, though of course it remains in the power of state and local lawmakers to provide otherwise. These judicial decisions often were obtained before the actual execution of financing schemes that the communities concerned deemed desirable, as in *Miles* and *Carruthers, supra.* The law there pronounced cannot be disregarded or overturned because a set of commitments made in reliance thereon has come to grief.

VII. CITY AUTHORITY

The ratepayers and four municipalities, Bandon, Cascade Locks, Drain, and the Canby Utility Board, contend that the cities had no authority by charter or by statute to enter into the Participants' Agreements. The cities of Springfield, McMinnville and Milton-Freewater, along with WPPSS, defend their authority to do so. The trial court held as a conclusion of law that "Municipal Participants do not have charter authority, either express or implied, to enter into the Participant's Agreement." More specifically, the court concluded that the agreements were a "guaranty" and a "pledge of systems revenues" to secure the obligations of WPPSS, and it held the agreements ultra vires because "Municipal Participants do not have statutory or charter authority to enter into such guaranty, security relationship or pledge, nor do they have statutory or charter authority to exercise extramural powers."

As stated earlier, it is inaccurate to treat the law of the cities' charter powers collectively rather than individually. To paraphrase what we said of debt limitations, the definition of charter powers is an individual matter for each city, a form of local legislation to be interpreted by the same means as any other legislation, including attention to the intent and purpose

of those who adopted it. The briefs devote much space and attention to quotations from past opinions, which in turn quoted treatises quoting case law, on "strict" or "liberal" construction of charter powers. But such supposed judical "rules of construction," though fairly quoted, are of limited utility in interpreting a particular city charter.

Again, charter authority "is not a matter of common law, to be resolved by consulting case law or encyclopedic summaries of case law." *Supra,* pp. 1329-1330. Adoption of a charter is a political act of a particular community at a particular time. A court's decision that one city did not have authority to undertake a project does not decide whether another city has such authority, or the same city at another time. A city can write or amend its charter or ordinance to define for itself what functions and services it wants its agencies to perform, consistent with statutes and the constitution. Within those constraints, a city may empower its government to operate utilities, including the distribution or the generation of electricity, or it may deny or limit that power. An earlier case involving the sale of electric power by one of the present parties, for instance, hinged on a provision of the McMinnville city charter that allowed it to sell such power to citizens of the city "and vicinity." *Yamhill Elec. Co. v. City of McMinnville,* 130 Or. 309, 274 P. 118, 280 P. 504 (1929). A charter also may specify whether it means to authorize only acts expressly mentioned, or others implied in order to achieve wider objectives, or perhaps specify different principles depending upon the function. In fact, the charters of several cities in this case contain directives that they be "liberally construed." To repeat, under home rule these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines. The court can only try to determine what political choice is expressed or implied in the charter or other source of authority.

Each of the cities here has charter provisions pertinent to the purchase of electricity. The Canby, McMinnville, and Springfield charters create separate utility boards or commissions. In the case of the Springfield Utility Board, whose

authority is disputed by the Springfield ratepayers, the charter authorizes the board to act for the city "in connection with all matters relating to the management, operation, acquisition, and financing of all electric . . . properties now owned or hereafter acquired by the city of Springfield." The "properties" referred to may be either generating or distributing facilities. It is unnecessary to construe the "properties" as including electricity, because actions taken to secure a future supply of electric power plainly relate to the management and operation of a distributing system.

Some of the other cities may have undertaken to distribute electricity under older terminology authorizing them to provide street lighting or "furnishing their inhabitants with gas or other lights," or under more general authority to provide services for their citizens. Their authority to provide electric utility service has long gone unchallenged and is not challenged here. The opponents do not put in issue any of the cities' authority to provide electric service and to obtain the necessary electric power from others. Understandably, none of the cities themselves nor the ratepayers argue that any of the respective charters do not permit the city to operate an electric utility system, to acquire electric power from distant suppliers, or to secure such supplies by long term contracts. They deny only that the authority to contract for future supplies of power extends so far as to enter into the Participants' Agreements used in this instance.

One of the arguments made by the opponents and accepted by the circuit court is that the agreements involve an "extramural" exercise of municipal power for which cities need authority from the state as well as from their own charters. They cite cases of an earlier generation that recited this rule in general terms, although the decisions rarely invalidated the particular activity in issue. *See, e.g., City of Salem v. O.-W. Water Serv. Co.,* 144 Or. 93, 23 P.2d 539 (1933) (sale of city water outside the city authorized by law and charter); *Yamhill Elec. Co. v. City of McMinnville, supra,* 130 Or. 309, 274 P. 118 (1929) (same for sale of electricity); *State v. Port of Astoria,* 79

Or. 1, 154 P. 399 (1916) (sustaining legislation for operations of port). *Richards v. City of Portland,* 121 Or. 340, 255 P. 326 (1927), denied the city's power to sell water beyond its boundaries, but that was in defense against a claim of nonresident plaintiffs that the city was bound to sell them water, and in *Yamhill Elec. Co. v. City of McMinnville, supra,* two years later the court said that "all expressions in the opinion in that case must be construed with reference to the issue there being tried." 130 Or. at 340, 274 P. 118.

A broad generalization that a city has no "power" or "authority" beyond its borders does little to explain what constitutes an exercise of "power" or "authority." It does not explain, for instance, why these terms apply to a city's sales of goods or services outside its borders more than to its purchases. Nor is it always clear whose interests the rule is meant to protect, that of the citizens who have authorized the city's action or that of the surrounding governmental entities and their inhabitants. Possibly the early opinions reflect concern about competitive encroachments by municipal enterprises or private business more than legal analysis. *See, e.g., Yamhill Elec. Co., supra.* Perhaps also the installation of permanent city facilities, even if accomplished by ordinary "proprietary" transactions, may sometimes represent an extension of the city's presence beyond its borders that should be authorized by the state rather than only the city's own citizens. *See, e.g., Riggs v Grants Pass,* 66 Or. 266, 134 P. 776 (1913). Primarily, however, the concept of "extramural power," power "outside the walls," is relevant when a city undertakes to assert coercive authority over persons or property outside its boundaries. It has little relevance to a city's contracts or other consensual transactions in goods or services, although an exercise of eminent domain outside city limits, for instance—would be an exercise of extramural power.

The opponents attack as "extramural authority" the provisions of the agreement that afford the participants certain privileges in supervising the construction and operation of the projects by means of a Participants' Committee. Without

setting out these provisions here, we agree that they would be a significant exercise of authority if a city attempted to impose them upon any enterprise not its own. In such a case the location of the projects outside the city could be significant. But the cities did not impose these provisions on WPPSS as an exercise of municipal power. Rather, their inclusion in the agreement between WPPSS and the participants clearly was a safeguard designed to give the participants a means to protect their interests in the success and the cost of the new source of power that WPPSS was contracting to provide for them. If the agreements survive the other attacks made upon them, the cities needed no additional authorization to share this protective function merely because the projects would be built outside their boundaries.

The circuit court also concluded that the agreements constituted an unauthorized "guarantee" of debts incurred by WPPSS, which were "secured" by a "pledge" of the municipal utility systems' revenues. We do not agree.

In Part VI above, we discussed essentially the same characterization of the agreement in rejecting the contention that the agreements were a forbidden "loan of credit" to WPPSS. There we noted that any long-term contract to buy a supplier's unspecified output at a price tied to the supplier's cost might serve as the economic basis for financing the supplier's purchase or construction of the requisite facility, and that the opponents distinguished the present agreement from such a contract only because the participants unconditionally obligated themselves to pay their share of those costs even if WPPSS was unable to deliver any power in return. We were not persuaded that the legal character of the transaction (as a purchase contract or a "loan of credit") should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none.

A legal distinction between a little electricity and none is even less apparent when the issue is charter authority, because here we deal with grants of power to responsible city officials rather than the meaning of a limiting term such as a "loan of credit." If a city may commit itself to purchase at cost whatever

a supplier using its best efforts can produce from facilities which will be financed in reliance on the city's contract, however small the production and however expensive the product turns out to be, then we see no reason why this authority stops at contracting to pay the costs if small and costly deliveries should turn out to be none at all.

These agreements proved unwise in retrospect, and with the benefit of hindsight they may appear to have been unwise when made. But that is no reason to find them unauthorized. When a city has authority to provide electric power or other public services, that authority cannot well be construed to permit wise but to exclude unwise contracts. A long-term commitment to pay the cost of a needed source of supply could prove to be a financial calamity in many imaginable situations. A city might contract to assure itself of a supply of oil in a period of shortages and high prices only to have the market price collapse in a subsequent oil glut. (Conversely, if McMinnville in the *Yamhil Electric Co.* case, *supra*, had made a firm contract to sell power it considered surplus, it later might have found itself having to pay far higher market price to replace it.) A city college might enter a long-term lease in order to have an apartment building converted to a dormitory for which there turns out to be no student demand. A desert city in need of a water supply might contract with some other entity to cover the costs of drilling wells in search of such a supply irrespective how little water was found. In the first example the price is excessive, the second acquisition proves superfluous, and the third may produce nothing in return for the money, but with respect to the issue of the cities' authority they are the same in principle. What distinguisnes the present case is only the magnitude of the sums involved.

A separate question remains whether the cities gave an unauthorized guarantee of the obligations, not of WPPSS, but of their fellow participants, when their unconditional obligation to pay regardless of deliveries is coupled with their agreement to pick up the shares of defaulting participants up to 25 percent of each participant's original share. We return to that question below.

VIII. THE PEOPLE'S UTILITY DISTRICTS.

Like the cities, the people's utility districts claim that they acted ultra vires, that is to say, exceeded their authority, in entering the Participants' Agreements. Of course, the PUDs' authority does not depend on individual charters, and there can be no question of their broad authority to enter into transactions appropriate to the operations of an electric utility; that is their function. Rather, the PUD's contentions, like the cities', also turn on characterizing the agreements as assuming debts or guarantees and not as power purchases.

The law governing PUDs is found both in the constitution and in statutes. Article XI, section 12, of the Oregon Constitution, adopted by means of an initiative in 1930, specified certain purposes and powers of such districts and directed the Legislative Assembly to provide any necessary legislation to carry out the provisions of the constitutional amendment.[16] That legislation is found in ORS chapter 261.

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[16] Or. Const. Art. XI, § 12:

> "Peoples' Utility Districts may be created of territory, contiguous or otherwise, within one or more counties, and may consist of an incorporated municipality, or municipalities, with or without unincorporated territory, for the purpose of supplying water for domestic and municipal purposes; for the development of water power and/or electric energy; and for the distribution, disposal and sale of water, water power and electric energy. Such districts shall be managed by boards of directors, consisting of five members, who shall be residents of such districts. Such districts shall have power:
>
> "(a) To call and hold elections within their respective districts.
>
> "(b) To levy taxes upon the taxable property of such districts.
>
> "(c) To issue, sell and assume evidences of indebtedness.
>
> "(d) To enter into contracts.
>
> "(e) To exercise the power of eminent domain.
>
> "(f) To acquire and hold real and other property necessary or incident to the business of such districts.

The constitution includes among the authorized purposes "the development of water power and/or electric energy" as well as its distribution and sale. It empowers the districts to levy property taxes, to issue, sell and assume bonds or other debt, to make contracts, to acquire property necessary or incident to the PUDs business, and to acquire, develop, or otherwise provide for electric energy for distribution both within and outside their territories. These powers are spelled out in greater detail in ORS 261.305—261.390.

As discussed in Part III of this opinion, additional provisions enacted in 1967 address the participation of PUDs in jointly owned power generating facilities. ORS 161.235—261.255. A district also may join in the formation of a "joint operating agency" for the generation and transmission of electric energy under ORS chapter 262. The districts did not use the procedures of these statutes in entering their agreements with WPPSS.

The crux of the PUDs' claim that their participation was ultra vires is that the Participants' Agreements created a form of debt that a PUD may incur only after obtaining approval of its qualified voters. ORS 261.305(6) requires such a vote for issuing revenue or general obligation bonds by procedures further specified in ORS 261.355—261.375.[17] WPPSS responds

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"(g) To acquire, develop, and/or otherwise provide for a supply of water, water power and electric energy.

"Such districts may sell, distribute and/or otherwise dispose of water, water power and electric energy within or without the territory of such districts."

Although this provision uses the spelling "Peoples'," the statutes use "people's." We follow the statutory spelling as more grammatical.

[17] ORS 261.305(6):

"To borrow money and incur indebtedness; to issue, sell and assume evidences of indebtedness; to refund and retire any indebtedness that may exist against or be assumed by the district or that may exist against the revenues of the district and to pledge any part of its revenues. Except as provided in ORS 261.380, no revenue or general obligation bonds shall be issued or sold without the approval of the qualified voters. The board of directors may borrow from

that the PUDs did not issue bonds but only entered into a long-term contract to buy a share of whatever power WNP 4 and WNP 5 might be capable of delivering, at a price based on the cost of that capability.

The PUDs concede that they did not issue bonds; WPPSS did. They argue, however, that the Participants' Agreements shared such essential characteristics of revenue bonds that they were "identical in substance" to issuing such bonds. The characteristics referred to are that the PUDs obligated themselves to pay a proportionate share of all costs of the projects, including debt service and termination costs, that they would set their own rates high enough to produce the needed revenue, and that the obligation was unconditional, whether or not the projects produced any power or WPPSS breached the agreements. Because the same obligations are typical of revenue bond financing by the PUDs themselves, and because WPPSS offered its prospective bondholders no source of repayment other than these contractual obligations of the participants, the PUDs describe WPPSS and its bonds as a mere "conduit" for financing the projects with revenues "pledged" by the participants, relying essentially on the precedent of *Martin v. Oregon Building Authority*, 276 Or. 135, 554 P.2d 126 (1976).

We have reviewed and rejected that analysis in Part IV, above. But the PUDs also point to the sentence in ORS

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banks or other financial institutions, on notes payable within 12 months, such sums as the board of directors deems necessary or advisable; however, the amounts so borrowed, together with the principal amounts of other like borrowings then outstanding and unpaid, shall not exceed the amount which the board of directors estimates as the district's net income (determined in accordance with the system of accounts maintained by the board pursuant to ORS 261.470) for the 12 full calendar months following the date of the proposed borrowing, adjusted by adding to the net income an amount equal to the estimated charges to depreciation for the 12-month period. No indebtedness shall be incurred or assumed except on account of the development, purchase and operation of a utility."

261.305(6), *supra,* that allows the directors to borrow from banks and financial institutions "on notes payable within 12 months" no more than the district's estimated net income for the 12 months following the "borrowing." The PUDs contend that this sentence limits their authority to "incur indebtedness" toward other than "banks or financial institutions," if it is not to have a loophole fatal to the apparent legislative purpose. They argue that if the restriction of ORS 261.305(6) applied only to banks or financial institutions, nothing would limit a PUD's authority to "borrow from General Motors, the Fred Meyer Trust, an Arab sheik or any other person with money to loan."

We may agree with the argument that the statutory limitation might apply to borrowing from any lender, whether or not it is primarily a bank or "financial institution" in the ordinary usage of those terms. But we need not decide this here, because we do not find any borrowing by the PUDs in this case.

The PUDs' brief quotes passages from *Fullerton v. Central Lincoln Utility Dist.,* 185 Or. 28, 201 P.2d 524 (1948), to the effect that the purpose of limiting the amount of borrowing without prior approval of the voters was "to require the directors to conduct the affairs of the district upon a pay-as-you-go basis," to require them "to carry on their corporate operations upon a cash basis," and "to put a brake upon the runaway enthusiasm of the directors." 185 Or. at 36-37, 44, 201 P.2d 524. The first two passages actually quoted books speaking generally about requirements for borrowing, not words of this court interpreting ORS 261.305(6), but they may state the general purpose of such requirements well enough. They were pertinent to *Fullerton,* which was a borrowing case. In *Fullerton,* the district actually issued revenue bonds, claiming that no prior approval by the voters was needed because the amount of the bonds did not exceed "the ordinary annual income and revenue of the district." The issue was whether these words in what is now ORS 261.305(6) meant gross revenue or net revenue, and the court held that they meant the district's "ordinary net annual income" for the year in question.

185 Or. at 38, 201 P.2d 524. But *Fullerton* did not deal with purchases. It did not hold that a PUD might not commit itself to a long-term power supply contract because the total commitment exceeds one year's net income, as long as such income covers the payments due during the year. We decline to hold so now.

For the reasons stated in Part VII with respect to the cities, the PUDs did not enter into an unauthorized "guarantee" of the bonds issued by WPPSS, as distinct from the question whether they guaranteed the obligations of their fellow participants, discussed below.

IX. OTHER ISSUES

A. Delegation.

The opponents contend that the participants' covenant to maintain electric rates adequate to meet payments due under the agreement, *supra,* n.2, unlawfully binds the future leadership of the cities or districts or unlawfully delegates their ratemaking authority. In the interest of not further lengthening this opinion, we do not review and distinguish the opinions quoted for the limits on elected officials in this respect. The short answer is that if the cities and PUDs, in managing their electric utilities, have the authority to make long-term financial commitments payable exclusively from future electric revenues, they also have authority to promise that the revenues will be maintained at a level adequate to meet the commitments. Otherwise a contractual obligation limited to such revenues could be avoided simply by setting rates too low to meet it, which means that in practice it could not be negotiated at all, or that the contract would have to be executed as a general obligation to be paid from other sources, including taxes, with all the legal consequences of such an obligation. The opponents in fact concede that a city may enter into a rate covenant when authorized by statute, without offering a reasoned explanation why a statute could overcome what purports to be a fundamental principal of governmental responsibility.

The Participants' Agreement does not set specified electric rates for any participant. It does not let WPPSS set the rates. The titles and PUDs retain responsibility for determining their rate schedules with respect to classes of service, classes of customers, minimum amounts, or whatever otherwise permissible variables they choose. They promised only to collect revenues adequate to cover their contractual obligations. That is not an unlawful delegation of power if the contractual obligations themselves are within their authority. These contentions therefore stand and fall with the opponents' challenge to the cities' and PUDs' authority to make the underlying contract.

B. Public Policy.

The PUDs argue, and the circuit court held, that the Participants' Agreement contravened the public policy expressed in the laws governing the PUDs' operations, ORS chapters 261 and 262. We note the difference between an argument that a contract among private parties is unenforceable under some governmental policy recognized by the courts and an argument that governmental action itself is against "public policy." When applied against governmental action, the "public policy" contention only argues for a nontechnical application of the policies and purposes of the governing statutes, and that is how the PUDs present it here. "Statutory policy" probably is a better term than "public policy" to avoid confusion between the two.

We have mentioned in Parts VII and VIII a possible issue whether the cities and the PUDs may turn out to have exceeded their authority in one respect which also is an issue of statutory policy. This issue may arise from the "step-up" clause, § 17(c), which increases each participant's share under the agreement up to 25 percent to cover possible defaults by other participants. Insofar as the step-up clause covers assumption of a defaulting participant's share in the "dry hole" risk, that is to say, in the eventuality of a total failure of the projects. It may be argued to be a "guarantee" of the defaulting participant's debt rather

than purchase of an increased share of project capability. Such a guarantee may be beyond the cities' respective authorities. It also may be contrary to the statutory policy of ORS 225.480, as to the cities, and ORS 261.250, as to the PUDs, to which we have referred in Part III. We do not decide that question, because the only issue now before us is whether the agreements were invalid when the cities and districts entered into them, and a contingent promise to take an increased share of power or power capability would not necessarily be an impermissible "guarantee" at that time. Whether there are defenses arising out of developments subsequent to the cities' and districts' initial entry into the agreements is not before us in this appeal.

Apart from this possible issue, however, we think that the claim of statutory, or "public," policy adds nothing to the previous analysis of the statutory law itself. Statutes, of course, are susceptible to interpretation that takes account of their intrinsic policies and purposes. But if "public policy" were a separate and additional argument beyond the statutes, it would become a wild card in litigation that would undermine the ability to enter transactions in reliance even on the most sophisticated interpretation of the state's laws. As we find no violation of the statutes when the PUDs entered into the Participants' Agreement, we also do not find that they violated the state's public policy.

C. Other States.

We add a few words about the decisions of other supreme courts concerning these agreements.

The Supreme Court of Idaho has held that five Idaho cities exceeded their authority in entering the Participants' Agreement with WPPSS *Asson v. City of Burley, Idaho,* 105 Idaho 432, 670 P.2d 839 (1983). The court held that the obligations undertaken by the cities contravened the municipal debt limitation stated in Idaho's constitution. Article 8, section 3 of that constitution forbids any local government to "incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it

for such year without a vote of qualified electors and provision for a tax to pay the interest and principal, and it provides that any indebtedness or liability incurred contrary to the section "shall be void." The issue before the Idaho court was whether the cities' obligations to WPPSS escaped this debt limitation clause because repayments were to be made exclusively from utility revenues rather than taxes, and the court held that the clause nevertheless applied because past Idaho precedents had rejected the "special fund" doctrine that confines debt limitations to debts that expose future tax revenues. 670 P.2d at 845-6, *citing Feil v. City of Coeur d' Alene,* 23 Idaho 32, 129 P. 643 (1912). Although subsequent amendments of Idaho Constitution, Article 8, section 3, had exempted "special fund" financing for some purposes, the court held that the Participants' Agreement did not qualify under any theory.

Justice Bakes dissented. He maintained that "only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position" on constitutional grounds. The dissent also noted that the cities in fact might have defenses under ordinary contract law which were not involved in the constitutional challenge brought before the Idaho court, and concluded that the court "should not bend our Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses." 670 P.2d at 851. In any event, the Idaho court's decision differs from ours simply because Oregon law does and Idaho law does not recognize the "special fund" rule that confines debt limitation clauses, unless otherwise stated or intended, to debts that potentially expose the government's tax revenues.

The Supreme Court of Washington, also in a split decision, relieved that state's municipal participants of their obligations on different grounds. *Chemical Bank v. Washington Public Power Supply System, supra.* The majority held that their agreement with WPPSS was ultra vires because, although each

participant had authority to contract for the purchase of electric power, it did not have authority to contract to pay for power generating capability that might turn out to be zero. The dissenters, Utter and Dolliver, JJ., would hold that the authority to purchase power also includes the authority to contract for a share of an uncertain supply of power yet to be developed. This dissent, like Justice Bakes's in Idaho, also protested that the majority undertook to save Washington municipalities from the consequences of the mismanaged WPPSS projects at the cost of narrowly restricting the authority of local governments to serve their citizens.

On this issue, our view of Oregon's tradition of local autonomy and local responsibility is closer to that expressed by Justices Utter and Dolliver than to the majority's restrictive reading of Washington law. As stated in Parts VI and VII of this opinion, once it is conceded that the cities and PUDs had authority to contract for a share of an uncertain amount of electric power at a price based on the proportionate costs of that share, no legal reason appears why their authority ceases at the point where the possibility of little power at exhorbitant cost includes the possibility of no power at all.

We therefore agree with the basic position taken by the defendant cities, Springfield, McMinnville and Milton-Freewater. A supplemental memorandum filed by these cities suggests that the Washington court's decision released so many of the other participants that by the terms of the Participants' Agreement itself any question of the Oregon cities' authority to enter the agreement is moot. That point may relate to the possible "contractual defenses" mentioned by Justice Bakes's dissent, above. It does not relate to the present action, which was brought by parties who seek to invalidate the transaction, not by parties who seek to enforce it. We therefore express no view of any defenses to such an action under the agreements. We hold only that the transactions were not beyond the authority of the cities and PUDS or otherwise illegal when they were made.

X. CONCLUSION

In summary, the issues in the present litigation are whether the plaintiffs' action should have been dismissed as untimely, and if not, whether the named Oregon cities and people's utility districts had authority in 1976 to enter into the Participants' Agreement, and whether in doing so they violated any limitations in their respective charters, in statutes, or in the Oregon Constitution. This case and our decision does not involve any question of anyone's present obligations if the agreements were validly made at that time.

The authority to make contracts for city and PUD electric utility systems and the limits on that authority have long-term importance beyond the WPPSS debacle. We judge these issues as of the time the transactions were made, not by hindsight. First, we agree with the cities of McMinnville, Milton-Freewater, and Springfield that the cities had authority under their respective charters to make the agreements. So did the PUDs under Article XI, section 12 of the Oregon Constitution and the statutes enacted to effectuate that section.

Second, we hold that the cities' and PUDs' existing authority was not narrowed by enactment of the Thermal Power Facilities Act or the Joint Operating Agency Act, with the possible exception that ORS 225.480 and ORS 261.250 may impose a statutory policy against guaranteeing the financial obligations of other participants through the "step-up" clause when no power is supplied in return. That possibility would not vitiate the entire transaction when made and it need not be decided now.

Third, the bonds issued by WPPSS were not the bonds of the individual participants, nor did the cities or PUDs issue bonds in another form without complying with the procedures required for that purpose. Also, the PUDs' agreement to pay WPPSS did not constitute borrowing by the PUDs so as to violate the statutory limits on such borrowing.

Fourth, we follow long-established Oregon law in holding that the agreements with WPPSS did not contravene the cities' charter debt limitations because they were payable entirely from utility revenues, not from taxes. The agreements also did not represent an unconstitutional loan of credit to WPPSS, again because the cities' taxing power and future tax revenues were not obligated.

Fifth, the covenant to maintain utility revenues adequate to meet the participants' obligations did not delegate the cities' or the PUDs' future authority to determine the actual rates by which the revenues would be collected.

When all is said and done, this case is about the exercise of powers and responsibilities entrusted by the people of Oregon to their local officials.' The constitution and the laws reflect that Oregonians have been of two minds about this as about other matters. At least since the beginning of this century, Oregon more than many states has wanted its local communities to be able to act autonomously to serve local needs or desires. This tradition of venturesome community action is embodied in the adoption of the home rule amendments in 1906 and 1958 and the people's utility district amendment in 1930. But the constitution and statutes also hedge public ventures with procedural and substantive limits on financing those ventures by debt. These legal powers and limits must be known with substantial certainty if the state and local communities are to deal with others in accomplishing their necessary or desired projects. For many years it has been understood that, unless the opposite intent is shown, debt limitations in Oregon refer to debts that obligate the community's tax revenues. Substantial certainty in future public transactions requires respect for existing legal rules and precedents, even when hindsight calls a particular transaction into question. If any city, or the legislature, wishes to tighten the rules for the future, it is in its power to do so.

The design of the agreements at issue in this case went to the bounds of Oregon law. The argument that the bounds were

crossed has been ably and strongly presented, but ultimately it asks us to hold that the design was illegal as a whole though it remained within each separate rule. Retrospective judicial evaluation of individual transactions by such a standard would not be a rule of law. Courts in other states have reached different conclusions under the laws of their states, which differ from Oregon's. The ultimate obligations and remedies of the present and other parties in the light of developments after 1976 are not before us now. We hold only that the Oregon cities and PUDs did not exceed the limits of their authority when they signed the Participants' Agreement at that time.

The decision to join in the agreement was one of policy for responsible public officials to make. It was made under conditions and on terms largely created by BPA, the federal agency on whom local public entities have been dependent for supplies of electric power. Officials responsible for electric utilities without generating capacity were led to believe that they had little alternative to the proposal offered them. Their policy decision to commit themselves to a share of the power WPPSS would undertake to produce at projects WNP 4 and 5, including the risk of high costs and little or no power, may have been wise or unwise when it was made. But it was a policy choice, not one for this court to undo by devising new law for the purpose.

The decision of the circuit court is reversed and the case is remanded to that court for entry of a judgment and such further proceedings as may be necessary.

LENT, LINDE and ROBERTS, JJ., filed a concurring opinion.

PETERSON, C.J., filed a concurring opinion.

LENT, LINDE, and ROBERTS, Justices, concurring.

The proponents of the validity of the challenged transactions contend that the plaintiffs' action is barred by laches or estoppel. Some members of the court believe that the issue of laches need not be reached if the plaintiffs' claim loses on the merits. We believe that it should be decided first. The court also is divided on the correct analysis.

"Laches" and "estoppel" are not different words for the same issue. A defendant's claim of laches arises from a plaintiff's prejudicial delay in asserting a claim for equitable relief, while conduct that gives rise to equitable estoppel, whether or not involving delay, vitiates the merits of the estopped party's claim. A defendant's assertion that a plaintiff is barred by laches from pursuing the claimed relief therefore should be dealt with before deciding the case on its merits. When laches is correctly seen as a time bar to plaintiff's action, like a statute of limitations, the claim must be disposed of before reaching the merits, not as a final obstacle to otherwise proper relief. If the only plaintiff or all plaintiff's in a case are disqualified by delay in commencing litigation, there is no party in a position to press the case. Litigation of the merits then is wasted time and effort and, on appeal, would reduce an opinion on the merits to dicta.

Here the opponents of the transaction argue that laches does not apply against governmental agencies, or if it sometimes can apply, then not under the circumstances of this case. This court has never arrived at a coherent analysis of Oregon law on this issue. It does not agree on a coherent analysis today. Statement of a rule is not simple, because Oregon law has developed partly from statutory policy and partly from cases that follow no consistent principle. Nevertheless, a principle emerges from the statute and past holdings that is sufficient for the present case. Because we believe it essential to identify one or more plaintiff's who are not barred by laches before the court reaches the merits, we analyze the court's past opinions and the applicable premises in some detail. We conclude that laches does not bar litigation solely between governmental units or officials that is designed to determine the legality of a governmental program or activity.

"Laches" means neglect or inaction, as in "laxness" or "laxity." The statutory time period within which to commence an action at law presumptively indicates what is reasonable or unreasonable also for equitable relief, but the presumption can be overcome. *Albino v. Albino*, 279 Or. 537, 553, 568 P.2d 1344

(1977); *Willis v. Nehalem Coal Co.*, 52 Or. 70, 90, 96 P. 528 (1908).

It may be that if a private party had entered into a formal transaction as far-reaching and important as the one before us, on the strength of which others had irreversibly committed themselves to large and irrecoverable expenditures, and if the party waited five and one-half years to sue to be released from that transaction on grounds that it could not properly enter into it, the party's request for equitable relief would be barred by laches even though the statute allows six years to commence actions "upon a contract or liability." ORS 12.080. This is not an action upon a contract but to declare that no legal contract was made. But the cities and the PUDs are not private parties, and the ratepayers, who are private persons, were not parties to the challenged transactions. We therefore must examine how delay affects their rights to equitable relief.

Laches is often described as a "doctrine," and "doctrines," as compared with rules of law, are distinguished more by broad statements than by sharp cutting edges. This court's experience with fitting the doctrine of laches to the powers and duties of government is no exception.

The court early postulated that statutes of limitation do not run against the state, a postulate it found in the Latin *nullum tempus occurit regi,* unless the statute provides otherwise. *State of Oregon v. Warner Valley Stock Co.*, 56 Or. 283, 308, 106 P. 780, 108 P. 861 (1910). The statutes did in fact provide otherwise from the enactment of section 13 of Deady's Code in 1862 until its amendment in 1903, Gen. Laws § 13, p. 18 (1903). *See State Land Board v. Lee,* 84 Or. 431, 431-436, 165 P. 372 (1917). The present statute, ORS 12.250, provides:

> "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit."

In the *Warner Valley Stock Co.* case, the court held that the state had failed adequately to allege and prove an excuse for its delay in suing to set aside certain deeds but should be allowed

to amend its pleading, thus implying without discussion that the state's suit otherwise would be barred. 56 Or. at 304, 312, 106 P. 780, 108 P. 861. On the strength of the implication in that case, the court in the next such suit said that it was "committed to the principle that the doctrine of laches is applicable to the state," but it held that laches was not shown. *State of Oregon v. Hyde*, 88 Or. 1, 40, 169 P. 757, 171 P. 582 (1918). Whether or not the quoted statement was justified when applied to suits to undo past conveyances, those cases gave no occasion to consider its wider implications, for instance for suits directed at preventing continuation of an unlawful condition or activity.

Nevertheless, the court later quoted the broad sentence that "doctrine of laches is applicable to the state" in cases in which the name of the state appeared only pro forma in actions by private relators to challenge the legality of school districts. *State ex rel v. School District No. 23*, 179 Or. 441, 461, 172 P.2d 655 (1946); *State ex rel. School District No. 9*, 148 Or. 273, 287, 31 P.2d 751, 36 P.2d 179 (1934). *See also State v. Union High School*, 152 Or. 412, 53 P.2d 1047 (1936). To apply the doctrine there the court had to turn what the statutues denominated as an "action at law" back into the extraordinary writ of quo warranto which the statutes had abolished and about which the court earlier had said that "[i]t is seldom that laches are imputed to a State in a *quo warranto* action to test the legality of an incorporation where the rights of the public are involved." *State ex rel v. Port of Tillamook*, 62 Or. 332, 334, 124 P. 637 (1912). The opinion in the *School District No. 9* case, *supra*, distinguished *quo warranto* actions brought to assert a public interest, in which the state is the real party in interest, from others brought in the name of the state by private parties in their own interest, and the court found the case to be of the latter kind. 148 Or. at 276-278, 31 P.2d 179. Again, in the *School District No. 23* case, *supra*, the court found that "the relator, and not the state, is the interested party," before holding that a delay of one year barred a taxpayer with knowledge of the facts from challenging the legality of the district and causing what the court described as "deplorable consequences." 179 Or. at 458-462, 172 P.2d 655.

The school district cases were treated as private actions by virtue of the characteristics of the relators and their interests. But when the state sued to set aside a probate order and to declare the decendent's property escheated to the state, the court rejected a defense of laches on the ground that it was not available against a suit by the government "to enforce a public right or to protect a public interest." *State v. Vincent*, 152 Or. 205, 214, 52 P.2d 203 (1936).

Two decisions of that period involved the defense of laches against suits on behalf of local governments. In *Amer. Surety Co. v. Multnomah County*, 171 Or. 287, 138 P.2d 597 (1943), plaintiff sued as subrogee of Marion County and defendant claimed laches. Plaintiff apparently conceded that "the sovereign is not exempt from the defense of laches," but the court found it unnecessary to consider the defense because the action was at law. 171 Or. at 324-328, 138 P.2d 597. *City of Pendleton v. Holman*, 177 Or. 532, 164 P.2d 434 (1945), was a suit to foreclose the lien of a street improvement assessment. Most of the opinion was devoted to rejecting defendants' argument that the statutes of limitations, though by then expressly excluding actions brought by governmental plaintiffs, nevertheless should apply against a city acting in its "private or proprietary capacity." The opinion described the street improvement as a "proprietary activity," and it again assumed without discussion that the foreclosure suit would be barred by laches, although the court held that the defendants had failed to plead the factual basis of this defense. 177 Or. at 548, 164 P.2d 434. But in a third case, a school district's action to recover funds paid out by a bank, the court stated that it was "not here concerned with private dealings but with matters affecting the public," and referred to the " 'well-settled' " that " 'no laches can be imputed to a municipal corporation, acting . . . in a public and governmental capacity.' " *School Dist. 47 v. U.S. Nat'l Bank*, 187 Or. 360, 383-384, 211 P.2d 723 (1949), *quoting Common School Dist. No. 61 v. Twin Falls Bank & Trust Co.*, 50 Idaho 711, 4 P.2d 342 (1931).

The most recent discussion of laches as a defense against a belated claim by the state occurred in *Corvallis Sand & Gravel v. Land Board*, 250 Or. 319, 439 P.2d 575 (1968). That was a

suit by a private company to enjoin an ejectment action brought against it by the State Land Board in order to establish the state's title to a riverbed, and the court noted that ejectment is an action at law and "laches is available only against a party seeking the aid of equity" 250 Or. at 324, 439 P.2d 575. Nevertheless, Justice Lusk, for the majority, proceeded with an extended review of the foregoing precedents, quoting from *State v. Vincent, supra,* that laches will not bar a suit "to enforce a public right or to protect a public interest," 250 Or. at 332, 439 P.2d 575, and concluding that the state's action sought to establish a title held in the state's governmental rather than its proprietary capacity. The opinion denied that the *Warner Valley Stock Co.* case had involved a "proprietary" rather than "governmental" claim and declared the statement in the *Hyde* case that the court was "committed" to applying, laches against the state to rest "upon an insecure foundation." 250 Or. at 326-338, 439 P.2d 575.[1] Justice O'Connell, dissenting, maintained that these distinctions could not decide the fairness of allowing the government a delayed claim against a private party. Because the real controversy was over the right to gravel, which the state dealt with in the same manner as private persons, he would have applied laches in the same manner as in litigation between private parties, 250 Or. at 330, 342, 439 P.2d. 575.

Undeniably the distinctions between "public" and "private" rights or between "governmental" and "proprietary" functions are inexact tests for barring delayed suits by the state or local governments. As Justice O'Connell wrote, they may serve to label easy cases but fail in difficult ones. 250 Or. at

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[1] The court found it difficult to explain its then recent decision in *Johnson v. Tax Commission,* 248 Or. 460, 435 P.2d 302 (1967), which held an assessor estopped, in his obviously public function of tax collection, to insist on a filing deadline which the taxpayer missed because the assessor sent him an outdated form. The court simply described it as an "exception." 250 Or. at 329, 439 P.2d 575. In any event, as the lead opinion in *Wiggins v. Barrett & Associates,* 295 Or. 679, 669 P.2d 1132 (1983) makes clear, *Johnson* and its successor, *Pilgrim Turkey Packers v. Dept. of Rev.,* 261 Or. 305, 493 P.2d 1372 (1972), dealt with estoppel, not with a defense of laches based on delay.

341, n.4, 439 P.2d 575. Moreover, those phrases are employed in other contexts where other rules or policies may cause these lines to be drawn differently than in the context of defenses against belated assertions of legal claims. Little is gained by describing an activity, for instance the construction, operation, and maintenance of streets or other public facilities, as "proprietary" for purposes of one legally correct outcome and "governmental" for purposes of another. Nor is it self-evident why an action to escheat a decedent's property asserts a "public" interest but an action challenging the legality of a school district asserts only a "private" interest when initiated by a taxpayer. *Compare State v. Vincent, supra, with State ex rel. v. School District No. 23, supra.*

Shortcomings in judicial formulas, however, do not prove error in the holdings they seek to express. The foregoing cases show that in barring suits by government for laches, lines sometimes have been drawn by the characteristics of the plaintiff, by the interest asserted, or by the relief sought. The lines obviously seek to accommodate competing policies, to preserve the legal responsibilities of government on one hand and fairness to those against whom government litigates on the other, but it does not follow that a balance between these policies simply is struck for each case. Without attempting a comprehensive statement in this case, we find in the past decisions elements for an analysis besides those already discussed.

First, the fact that "laches" is an equitable doctrine rather than statutory law tends to mask the fact that its application against the government nonetheless is as much a question of law as the application of a statute of limitations. Even when government sometimes acts like a private party, the two differ insofar as the state, unlike a private party, can legislate for itself whether to be bound by periods of limitation. *Cf. Wiggins v. Barrett & Associates,* 295 Or. 679, 700-701, 669 P.2d 1132 (1983) (concurring opinion). The legislature has done so in ORS 12.250, previously quoted, which exempts both the state and local entities from general periods of limitation. Obviously,

the state's policy toward delayed private litigation is not its policy toward delayed litigation by governmental plaintiffs.

To interpret a statute of limitations which is silent with respect to government as not binding the state attributes that policy choice to the state itself. In *Withers et al, v. Reed,* 194 Or. 541, 243 P.2d 283 (1952), which concerned a statute terminating unused water rights, the court concluded that although the statute did not expressly apply to rights held by the state, its dominant policy was to return the water to potential beneficial use by others. Justice Lusk's lead opinion for three members of the court observed that "*nullum tempus occurrit regi*" depends on policies implied in the face of legislative silence. Relevant here is his quotation of "the classic exposition of the doctrine" by Justice Story in *United States v. Hoar,* 2 Mason 311, 313 (1821):

> " 'The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects,) is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments,* * *' "

quoted in 194 Or. at 544-545, 243 P.2d 283.

The "great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers," sometimes requires belated legal action by those officers, or by their successors. Sometimes it requires legal action by private citizens in the name of the state or in other forms of action provided for the purpose. If a policy governing laches is to allow for preserving public property as well as

public rights, it cannot well exclude the "proprietary" activities of public agencies. Some public agencies, like the people's utility districts in this case, exist only for "proprietary" functions of delivering goods and services; they do not "govern" people.

Why should the government, or an interested citizen, ever be barred from confining governmental action within legal bounds and from calling upon a court to declare and enforce those bounds? As this court's past opinions show, the early generalization that "the doctrine of laches is applicable to the state" was too broad. Yet the opposite need not be true, that laches never applies.

When the state sends its agencies into the market to engage in ordinary commercial and property transactions indistinguishable from those of private enterprises, the state's implied policy may be to give those transactions the same security against belated litigation of ordinary disputes. Early decisions stretched concepts such as "proprietary activity" in order to extend that security to private interests in property, particularly real property. This may explain barring the city's belated lien foreclosure in *City of Pendleton v. Holman, supra,* as well as the suits to set aside deeds in the *Warner Valley Stock Co.* and *Hyde* cases, *supra.* There is less reason to assume such a policy toward actions seeking declaratory or prospective relief from continuing a disputed transaction or condition, as in *Corvallis Sand & Gravel v. Land Board, supra.*

Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers.[2] WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that

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[2] None of the rural electric cooperatives that have fractional participation in the Participants' Agreements are parties here, and their characterization as private or government-sponsored entities is immaterial to the present point. Nor are private lenders or suppliers to WPPSS parties to this litigation.

state. *See Chemical Bank v. WPPSS,* 99 Wash.2d 772, 666 P2d 329 (1983). The Participants' Agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public program does apply, at least as to the municipalities that are challenging the program.

A few cases elsewhere contain statements to the contrary. In a dispute between a county and certain municipalities over the distribution of fuel taxes, an Arizona court stated the rule that "neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat a public interest." But the court then continued that "the reason for the rule denying the defense disappears when the contest is solely between two public bodies." *Maricopa County v. Cities & Towns of Avondale, et al.,* 12 Ariz. App. 109, 113, 467 F.2d 949 (1970). It appears that the court was influenced by the idea that some taxpayers might gain and others might lose by a judicial examination of the financial distribution. Such a rule would prevent challenges to governmental illegality merely because the private interests of the taxpayers of the government which acted illegally would be adversely affected by ending or correcting the illegality. That is not a persuasive reason why alleged governmental irregularities should escape scrutiny.

The Arizona court cited two other cases. In *State ex rel v. Clay County,* 226 Iowa 885, 285 N.W.2d 229, 235 (1939), a dispute about which county was liable for a person's support in the state hospital, the opinion recognized the general rule

against applying "laches" to the acts of governmental agents to be "for the protection of the public," but as between two counties the court saw "no good reason why public policy should require that the people of one be penalized for the laches of the representatives of another." This Iowa opinion discussed both estoppel and laches without making a clear distinction between them. It appears that in the quoted sentence, the court addressed the effect of an earlier neglect by one county on the merits of its position rather than the procedural effect of delay in commencing the suit.

The other precedent cited by the Arizona court, *Royal Oak Tp. v. School Districts No. 7*, 322 Mich. 397, 403, 33 N.W.2d 908 (1948), states that Michigan law applies the doctrine of laches between municipal corporations. But the Michigan court's full statement also rejects the rule that laches does not bar a municipality's enforcement of "public rights," apparently against anyone. Oregon law differs from Michigan. This court's decisions recognize the "public rights" exception to laches in suits by the state, *State v. Vincent, supra,* or initiated by local relators, as in the *School District No. 9* and *Port of Tillamook* cases, *supra.*

The three cases from other states do not state the law in Oregon. The directive of ORS 12.250, that the general limitation periods "shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit," applies to actions by governmental bodies in their "proprietary" capacities. *City of Pendleton v. Holman, supra,* citing *American Surety Co. v. Multnomah County, supra, Seeck v. City of Lebanon,* 148 Or. 291, 36 P.2d 334 (1934). About the contention that actions by municipalities should be time-barred if they concerned "proprietary activities," the court wrote:

> "Had it been the intention of the legislature to subject municipalities to the operation of the statute of limitations in their proprietary activities, it could have accomplished

> its purpose in one of two ways. Either it could have repealed outright § 13 of the 1862 Code of Civil Procedure, or, in the amendment of that section in 1903, it could have exempted municipalities from the operation of the statute only to the extent of their public or governmental functions. It did neither."

177 Or. at 541, 164 P.2d 434. In a fairly recent case, *Chizek v. Port of Newport*, 252 Or. 570, 450 P.2d 749 (1969), the court cited ORS 12.250 and the quotation from *State Land Board v. Lee, supra*, that the principle of denying limitations against government is "to preserve public rights, revenues and property from injury and loss by the negligence of public officers." 84 Or. at 434, 165 P. 372. The court allowed the port belatedly to set aside an adverse title gained by an invalid tax foreclosure, obviously a "proprietary" issue:

> "When the property of one division of government is lost to another division of government and then sold to a private party, the public is not served. The only party who gains is the purchaser at the foreclosure and there is no policy reason to prefer him over a public body.
>
> "We hold that the Port, as a public body, is not barred by the statute of limitation and the tax foreclosure proceeding is invalid and, therefore, the plaintiffs secured no title to the disputed property."

252 Or. at 573, 450 P.2d 749.

The law in this state is that actions by the state or municipalities are not barred by the statute of limitations, irrespective whether they concern "proprietary" activities, as most civil actions do. ORS 12.250. That is the state's announced public policy on the question, and this court so treated it as recently as 1969.

It makes no sense to draw a line for imposing time limitations on declaratory judgment proceedings by a governmental plaintiff that would depend on whether the proceeding is characterized as being "in law" or "in equity," if an action

under chapter 28 simply asks for a declaration of the legal rights, status, or relations of the parties, ORS 28.010, no limitation under ORS chapter 12 would apply irrespective whether the subject matter concerns "proprietary" activities. Nor would it apply to a damage action for breach of contract, fraud, negligence, or whatever. ORS 12.250. Moreover, insertion of such a line around equitable relief arising from "proprietary" activities, as the Chief Justice's concurring opinion proposes, then carries with it a further exception for claims by governmental plaintiffs that their past actions were "ultra vires," forcing trial courts to litigate that difficult and imprecise issue at the initial stage of determining whether the plaintiff is barred by time from maintaining the litigation.

Despite expressions in some of the early opinions we have reviewed, the court's holdings do not establish such a rule. The holdings generally have rejected claims of laches against public plaintiffs asserting public rights. The few exceptions have been cases protecting a private party's reliance on past governmental property or business transactions. With governmental agencies on the opposing sides, this is not such a case. As to these contending agencies, the applicable principle, recognized in ORS 12.250 and quoted by Justice Lusk, is " 'the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Withers et al v. Reed, supra,* 194 Or. at 545, 243 P.2d 283 (quoting *United States v. Hoar,* 2 Mason 311, 313). That principle prevents barring the cities from pursuing this declaratory judgment action against WPPSS, despite the undoubted "proprietary" character of their electric utility functions.

PETERSON, Chief Justice, concurring.

I join without reservation in the opinion of the court.

As is apparent from the separate concurring opinion of Lent, Linde and Roberts, JJ., the court is not in agreement on the laches question.

The main underpinning for their conclusion that laches does not apply appears to be that because a substantial part of

this litigation is between governmental agencies and concerns the powers of those agencies, this case does not fit the assumptions for an implicit policy of the state to apply laches against belated claims of its own agencies. Such discussion as there is to support the stated conclusion is found at page 606 of 296 Or., at pages 1349-1350 of 679 P.2d of concurring opinion where this statement is made:

> "Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers. WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that state. *See Chemical Bank v. WPPSS*, 99 Wash. 2d 772, 666 P.2d 329 (1983). The participants' agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public program does apply, at least as to the municipalities that are challenging the program." (Footnote omitted.) 296 Or. at 606, 679 P.2d at 1349-1350.

Their concurrence strikes me as lacking analysis to support the stated conclusion. If laches is otherwise assertable, why should the laches rule differ if the suit is between governmental bodies? I believe that the rule should be the same in both

situations. Let me give an example to put the issue in clearer perspective.

Suppose the city of Drain (Drain is a small community south of Springfield. Both are parties in this case.) concurrently contracts with two parties for electrical power. One contract is with the city of Springfield; the other is with a private supplier, PNW Electric. Suppose that identical contract disputes arise between Drain and its suppliers and Drain seeks equitable relief. Finally, suppose that Drain is guilty of laches.

Under the theory of the other concurring opinion, PNW will successfully defend the Drain claim because laches will bar Drain's claim. Springfield's attempt to invoke laches will not succeed because it, like Drain, is a public body. Springfield and its citizens will be required to perform obligations which its private counterpart, under identical circumstances, will not be required to pay or perform.

The point is that if, under the facts of any case, equitable relief should be denied because it is inequitable to enforce the claim, whether the party invoking laches is a private person or a municipal corporation is beside the point. That has been the decision of every court which has considered the matter.[1] It should be ours as well.

In *Maricopa County v. Cities & Towns of Avondale,* 12 Ariz. App. 109, 467 P.2d 949 (1970), a county sought to recover the amount of use fuel tax monies it had mistakenly paid to the defendant cities and towns. The court held that laches may defeat the claim, saying:

> "Laches may also defeat a claim for restitution. Restatement, supra, § 148. Laches involves an unreasonable delay after knowledge of the facts which works a hardship. *Id.* The County contends here that laches cannot be so applied as to bar a claim by a public body in its

[1]The writers of the other concurring opinion state that "[a] few cases contain statements to the contrary." 296 Or. at 606, 679 P.2d at 1350. I have found no case that holds that if laches otherwise were a defense it would not apply because both parties are public bodies.

governmental capacity. We agree to the extent that neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat the public interest. [Citing cases.] But the reason for the rule denying the defense disappears when the contest is solely between two public bodies. State ex rel. *O'Connor v. Clay County,* 226 Iowa 885, 285 N.W. 229, 235 (1939). Accordingly, as between municipal corporations, the defense of laches is available. *Royal Oak Township v. School District No. 7,* 322 Mich. 397, 33 N.W.2d 908, 911 (1948)."

The Michigan court reached the same result in *Royal Oak Tp. v. School Dist. No. 7,* 322 Mich. 397, 33 N.W.2d 908 (1948). The Michigan court, in rejecting the claim that laches was not applicable against a municipal corporation, stated that "the law is well settled that as between municipal corporations the equitable doctrine is applicable."

The Supreme Court of Iowa, in *State ex rel O'Connor v. Clay County,* 226 Iowa 884, 285 N.W. 229, 235 (1939), applied laches, saying:

> "Public policy in some cases does forbid the application of the doctrine of laches to the acts of an arm of the government through its representatives. This is for the protection of the public. But where two counties are the interested parties there is no good reason why public policy should require that the people of one be penalized for the laches of the representatives for the other. The law should as far as possible, protect both, without preference to either."

See also Independent School District No. 4 v. State Board of Ed., 451 P.2d 684, 687 (Okla. 1969).

The cited cases state a rule directly contrary to the conclusion of the other concurring opinion. In Arizona and Iowa, similar to Oregon, the general rule is that public policy forbids the application of laches to an arm of the government if a public right or public interest is at issue. In both of the cited cases from Arizona and Iowa, the courts nonetheless applied laches in cases involving governmental acts. In Oregon we have followed the government/proprietary distinction; laches is available as a defense to a claim of a public body acting in a

proprietary capacity. Making laches available as between public bodies, especially when the actions at issue are proprietary, is consistent not only with our precedents, but with the policy cited above that the citizens of one public body should not be penalized for the laches of the representatives of the other.[2]

Laches is the label for a rule that relief will be denied as inequitable in those cases in which unreasonable delay in asserting rights results in disadvantage or prejudice. The rule is of long standing. The reasons for applying laches in disputes between governments are as applicable here as in a "conventional, commercial or property transaction," (296 Or. at 606, 679 P.2d at 1350) and we should not abandon the doctrine in this case. If laches is made out, I would grant public bodies no fewer rights than private concerns. I see no reason to change the laches rule simply because the dispute is between public bodies.[3]

Because of the court's unanimous decision that the local public bodies who entered into the challenged agreements had legal authority to do so, it is not necessary to decide whether the trial court erred in striking the WPPSS laches affirmative defense. Therefore, all statements made in the concurring opinions concerning laches are dicta (except for this sentence).

CAMPBELL, CARSON, and JONES, JJ., join in this concurring opinion.

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[2]Furnishing electric power is a proprietary function. *Twohy Bros. Co. v. Ochoco Irr. Dist.*, 108 Or. 1, 40, 210 P. 873, 216 P. 189 (1922).

[3]I also disagree with a number of other statements contained in the other separate opinion but will not take the time and space to explain the reasons for my disagreement. The writers of that opinion would inter the governmental/proprietary distinction which has been applied in a number of cases and would overrule our precedents denying relief to private relators. 296 Or. at 605, 679 P.2d at 1349.

Appendix H

677 P.2d 799

PACIFIC POWER & LIGHT COMPANY, a corporation,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
LOWER VALLEY POWER & LIGHT INC.,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
CHEMICAL BANK, a New York corporation,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
Nos. 83-75 to 83-78.
Supreme Court of Wyoming.
Feb. 7, 1984.
Rehearing Denied March 8, 1984
in No. 83-75.

Affirmed as to utility and dismissed as moot as to all other appellants.

Rose, J., concurred specially and filed opinion.

Thomas, J., dissented and filed opinion.

Houston G. Williams of Williams, Porter, Day & Neville, P.C., Casper, and Leonard A. Girard, Portland, Or., for appellant Pacific Power & Light Co.

Ted C. Frome, Afton, for appellant Lower Valley Power & Light, Inc.

Carl L. Lathrop and Richard P. Boley of Lathrop & Uchner, Cheyenne, for appellant Chemical Bank.

Thomas A. Nicholas and Alan B. Minier, of Hirst & Applegate, Cheyenne, and Michele Coad, Seattle, Wash., for appellant Washington Public Power Supply System.

A.G. McClintock, Atty. Gen., Steven R. Shanahan, Sr. Asst. Atty. Gen., and Ennis M. Boal, Asst. Atty. Gen., for appellee The Public Service Com'n of Wyoming.

Before ROONEY, C.J., and THOMAS, ROSE, BROWN and CARDINE, J. J.

ROONEY, Chief Justice.

This is an appeal from a district court ruling affirming an order of the Wyoming Public Service Commission (PSC) which denied appellants the right to recover in rates any and all investments, expenses or obligations related to three abandoned nuclear power construction projects.

We hold the matter to be moot as to all appellants except Pacific Power & Light Company (PP & L), and we affirm the decision of appellee insofar as it pertains to PP & L.

There are four appellants. Appellant Lower Valley Power and Light, Inc. (LV) is a distribution level electric cooperative. Appellant PP & L is a publicly held corporation providing electric service as a regulated public utility. Both LV and PP & L are electric public utilities within the regulatory jurisdiction of the Wyoming PSC. Appellant Washington Public Power Supply System (WPPSS) is a joint operating agency which builds, owns and operates electric generation and transmission facilities and sells electric power to its members and others. Appellant Chemical Bank (CB) is a New York corporation which is a bond-fund trustee.

LV and Fall River (FR), another distribution level electric cooperative which is not a party to this appeal, along with 86 other electric utility cooperatives, municipalities, and public

utility districts, each signed, on July 14, 1976, identical Participants' Agreements (Agreements) which entitled them to a percentage share of power from two nuclear power projects (WNP-4 and WNP-5) which WPPSS was constructing in the state of Washington and which obligated them to pay a proportion of the costs of said projects "whether or not" the projects were ever completed. PP & L was a 10% owner of WNP-5, and also was participating in another nuclear power project known as Pebble Springs, WPPSS financed its ownership shares of WNP-4 and WNP-5 through the sale of municipal tax exempt bonds. CB is the bond-fund trustee for said bonds.

The Agreements executed by LV and FR were not submitted to the PSC for review or approval prior to their execution, or at any time subsequent.

Construction of WNP-4 and WNP-5 was begun in 1976 and abandoned in 1981, when WNP-4 was 16% complete and WNP-5 was 20% complete. The Pebble Springs project was terminated in 1982, with no construction ever being done, but with over $200 million invested in site preparation. No electric power will ever be generated by any of these three power plant projects.

The controversy was initiated by the PSC under its investigative powers pursuant to § 37-2-117, W.S.1977[1] through a "Notice and Order Setting Hearing" made and entered on April 22, 1982 and directed to LV, PP & L and FR. The Commission Staff had previously petitioned the Commission to investigate the matter as to LV. Of course, the Commission could institute the investigation without such petition "summarily" and "of its own motion". It did so with its "Notice and Order Setting Hearing". The record amply reflects the waiver

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[1] Section 37-2-117, provides:

"Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same."

of any defect or objection in and to the investigation by PP & L. The scope of the investigation was also explored and understood by the parties, and the hearing proceeded on the issue of whether or not the investment, expenses and obligations incurred by PP & L and LV in the projects could be properly considered in fixing the rate base for their operation, and it did not proceed on the issue of what the rates should be, *i.e.*, a rate case.

The transcript reflects that all parties recognized the correct issue and that it would be pertinent to rates and the procedure and evidence would be similar to that of a rate case. The following occurred prior to the testimony of the first PP & L witness:

> "MR. ROGERS [Representing PSC Staff]: . . . I do have one additional matter.
>
> "CHAIRMAN SMYTH: Yes.
>
> "MR. ROGERS: And that is concerning the filing by the company made on July 2, 1982, pursuant to the commission's order. The commission will recall that these matters were originally set for hearing on July 16th of 1982, pursuant to the commission order of April 22, 1982.

"Upon the motion of the staff the hearings were continued until this week, and that was made pursuant to the commission's order of May 28, 1982. And contained within that order was a provision that all testimony by all parties was to be filed on or before July 2, 1982.

"Now, I don't know if the commission is aware, but as part of the company's filing on July 2, on or about July 2, they filed tariffs, and those tariffs contain a request for a change of rates in amounts variously set at $5,743,000, or $10,967,000. It was the staff's understanding at the beginning that this was to be a generic matter, that it was not to be a rate matter. The filing made by the company has changed that to a contested case.

> "And the staff has concerns regarding the notice requirement of the Administrative Procedures Act, with

regard to this matter. I am sure that the commission will recall its own rulings, that a rate making matter is a contested matter under the act, and the commission, or the act is very specific with regard to the notice required.

"And I think that this matter should be resolved by the commission in some way. I have broached the matter with Mr. Girard, and we are attempting to come up with some type of a solution to the problem, but I think that the commission should be made aware of it prior to the beginning of this testimony.

"CHAIRMAN SMYTH: Mr. Girard, do you wish to respond to that?

"MR. GIRARD: Very briefly. Mr. Rogers is correct, he made me aware of this matter, I think it was five or six minutes before the hearing commenced this afternoon, so he and I didn't really have time to have a calm lawyer-like discussion of the problem. He agreed to raise it to bring it to your attention. The only thing I will say is this: The purpose of the generic proceeding, I believe, was to determine how to deal with the costs of the nuclear plants at issue.

"And the question the company had was: The generic proceeding presumably will consider how much was spent, why was it spent, was it reasonable, who bears the risk of that and so forth. And let us assume just for discussion, that the commission considered all that, and after deliberating said, 'We think the total costs that should be borne by ratepayers are, say, $10 million a year for five years'.

"Then the question would get to be, 'What would then happen?' Presumably, if the company hadn't filed rates it could then file rates designed to achieve the level of revenues found appropriate by the commission. And we would then wonder, would we have a rate case in which every issue would be open again, and we would then retry the question of who should pay for the nuclear plants.

"We figured that the commission likely didn't want to do that, that this is the hearing to find out how that

expenditure is going to be dealt with. There may be a question as to exactly how the—which particular ratepayer should pay for it, but we would think that there should be one time and one time only to decide, is that a stockholder responsibility, a ratepayer responsibility, or anywhere in between.

"That's all I have to say.

* * * * * *

"CHAIRMAN SMYTH: We will come back to order.

"The commission feels very strongly, not just a little bit, that this was wrong, that we cannot have a rate case without giving notice to the public, and that any issues as to asking ratepayers to pay for amounts in the future, will be taken care of in future rate cases and will not be taken care of in this generic hearing which is to determine whether or not any amount should be involved.

"And therefore, there being no notice to the public, and certainly in these cases significant intervention has been made by the public in the past, we will restrict the hearing to those matters that have previously been noticed and that as to what rates you are required in the future to pay for any amounts that might be found will be a matter to be determined in the future rate case.

"And perhaps, since you already have one filed before us, that it might be a more proper time to discuss those kinds of issues.

"So, if you will proceed on that basis, Mr. Girard.

"MR. GIRARD: Fine, thank-you.

"I should have mentioned that when the revised rate schedules were filed, notice was posted, there was not a mailing made or I don't think a newspaper publication made. I wanted [sic] :he record to show that, and I am not arguing it was adequate or what is not.

"We will present the case and the only question is, whether we should try and strike from it, if you will, before we ask our questions that material that might be offensive.

"One thing I think, Your Honor, Mr. Chairman, is that the testimony of witness Sloan, who is our rate witness, may be appropriate, and we will have to allow you of course to make the ruling when the time comes, to at least show for illustrative purposes the type of impact there would be on the ratepayers.

"CHAIRMAN SMYTH: I might express to you that we will be restrictive and we are talking what is required rates of return at this time. That's matter for rate cases, and I am sure by the time we get down to that testimony, we will have had lots of testimony before this commission. I do not want to in any way impair your presentation of this case.

"However, the ground rules are those matters that are germane will be heard, those matters that are not presumably staff will object to them and they will not be heard, and if staff doesn't object to them, if I find they are not material I will certainly advise you, and as you well know I am not bashful in this manner.

"MR. GIRARD: I would stipulate that.

"(Laughter.)

"MR. ROGERS: So will staff."

Again, before presenting the testimony of PP & L's witness Watson:

"MR. GIRARD: . . .

"This case, of course, based on the ruling of the Commission will not involve a contested rate case. . . .

* * * * * *

"I discussed this part with Staff Counsel because the concern, I'm sure, that Staff has and the Commission has is this isn't a general rate case. . . .

* * * * * *

> " . . . It is the Staff's position and has been from the beginning that the issue in this case is whether or not the ratepayer should pay. . . .

The Commission's investigation had for its purpose the determination of whether or not the investment, expenses and obligations incurred by PP & L and LV in the projects could be considered in connection with rates later to be set for PP & L and LV in Wyoming.

> "(a) The term 'rate,' when used in this act, shall mean and include . . . every . . . charge or other compensation for service rendered or to be rendered . . . and every . . . practice, act, requirement or privilege in any way relating to such . . . charge or other compensation . . ." Section 37-1-102(a), W.S. 1977.

Section 37-2-117, W.S.1977, supra, fn. 1, authorizes investigation of "any act . . . accomplished or proposed, or an investigation of any rate" which the Commission believes should be made "to secure compliance with the provisions of this act and orders of the commission."

The association of PP & L and of LV with the projects are certainly acts and practices "in any way related" to the charges and compensation for services to be rendered by them. And the Commission could well believe that an investigation was proper to determine if the projects were or could be part of that subsequently to be considered in fixing rates pursuant to § 37-2-122(a), W.S.1977, infra, fn. 5.

The PSC concluded that the Agreements executed by LV and FR constituted a guarantee of securities as contemplated by § 37-6-101 et seq., W.S.1977, and that their failure to obtain PSC authorization rendered the Agreements void for rate making and other purposes within the regulatory jurisdiction of the PSC. Further, that the costs incurred by LV, FR and PP & L could not be lawfully passed on to their rate payers, as the projects were not and would not be "used and useful" for the convenience of the public.

Appellants LV, PP & L, WPPSS and CB all filed petitions for review of the Commission Order, which were ultimately consolidated. The district court affirmed the Commission Order without independent review, whereupon appellants appealed to this court.

Lower Valley, Washington Public Power Supply System, and Chemical Bank

While all of the litigation below was going on, litigation was also progressing in other states. The decisions reached in the state of Washington are particularly significant to the case before us presently.

The Washington Supreme Court had before it the case of *Chemical Bank, a New York corporation v. Washington Public Power Supply System,* 99 Wash.2d 772, 666 P.2d 329 (1983). It involved WNP-4 and WNP-5, wherein CB brought a declaratory judgment action against WPPSS and the participants (those who had signed Participants' Agreements, including LV and FR) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, of which CB is trustee, with interest. The Washington Supreme Court held that the defendants who were Washington public utility districts or Washington municipalities lacked authority to enter into said agreement and as to them the agreement was ultra vires, void ab initio, invalid, ineffective and unenforceable.

Subsequently, and pursuant to mandate from the Washington Supreme Court, the Superior Court of Washington for King County, in its Order and Judgment, held that:

> "2. Inasmuch as the Participants' Agreement is ultra vires, void ab initio, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority

of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability."[2]

Further, the Superior Court held that:

"3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the 'Bond Resolution'), to make any payment to WPPSS, or to any other defendant, or to Chemical or to any purchaser or holder of bonds issued by WPPSS in connection with the Projects."

We agree with the Washington Superior Court that because the Participants' Agreement is void ab initio as to 68.275% of the participants, [3] it is also ineffective and unenforceable as to the other participants on the grounds quoted above. Therefore, we hold that the case at bar is moot as regards appellant LV. LV has no debt because of the projects' failure and the issue is not pertinent to any case now or hereafter filed by LV.

". . . [W]hen no judgment rendered can be carried into effect the cause is moot . . . ." *Belondon v. State,* Wyo., 379 P.2d 828, 829 (1963).

This being so, we also hold that this case is moot as to WPPSS and CB, as their interests were predicated on the validity of the Participants' Agreement.

Pacific Power & Light

The above considerations do not control the disposition of appellant PP & L, as PP & L was not a participant under the Participants' Agreement, but rather a 10% owner of WNP-5, and 29.4% owner of Pebble Springs.

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[2] *Chemical Bank v. Washington Public Power Supply System,* Case No. 82-2-06840-3, August 11, 1983.

[3] Namely, the Washington Public Utility districts and Washington municipalities.

OSC founded its decision, relative to PP & L, on an application of the provisions of § 37-2-119, W.S.1977, which provides in part:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value . . . ."

Emphasizing the "used and useful" language of this section, PSC found the investment, expenses and obligations incurred by PP & L could not properly be considered in fixing the rate base for PP & L's operation.

If the projects had been successful and had gone on line for production of electricity for public convenience, the cost or value would have been properly considered in establishing a rate base. Since they were not successful and were only partially constructed, they could never become "property" of a "used and useful" nature. Although the project undertakings might conceivably be part of the "business" of PP & L,[4] we need not determine such inasmuch as the business activity relating to the projects was not current so as to meet the "used and useful" requirement, as the "used and useful" status must be as of the time of rate consideration. *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); *Boston Gas Company v. Department of Public Utilities,* 367 Mass. 92, 324 N.E.2d 372 (1975); *South Dakota Public Utilities Commission v. Otter Tail Power Company,* S.D., 291 N.W.2d 291 (1980).

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[4] Business is " 'the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain.' " *In re Lamont,* 48 Wyo. 56, 41 P.2d 497, 502 (1935). Business is " '[a]ny occupation connected with the operations and details of trade or industry.' " *Zurich Insurance Company v. Friedlander,* 261 Md. 612, 276 A.2d 658, 660 (1971).

Although the investment, expenses and obligations resulting from the projects do not conform to the "used and useful" concept, PP & L contends that they could still qualify for consideration in establishing a rate base if they are a prudent, reasonable and proper expense of operation.[5] Other jurisdictions have dealt with the obligations herein considered as operating expenses and not as property under the "used and useful" principle.[6]

We cannot accept the investment, expenses and obligations incurred in construction, or intended construction of property which would normally qualify as "used and useful" for inclusion in a rate base as an operating expense. An operating expense includes:

> "In general, various particular expenses of a public utility are properly chargeable to expense of operation, including any legitimate expense contributing to the better management or greater efficiency of the utility, a reduction of its

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[5] Section 37-2-122(a), W.S.1977, provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

[6] See *Office of Consumers' Counsel v. Public Utilities Commission*, 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820 (1981), dismissed *Cleveland Electric Illuminating Company v. Office of Consumer's Counsel*, 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), where the court quoted the commission order as stating, " '. . . [t]hus, we now see the wisdom of the standard emerging from the cases from other jurisdictions; if the expenditures are prudent, amortization should be permitted.' " Id. 67 Ohio St.2d 153, 423 N.E.2d at 825. The court also said: "[t]he core issue . . . is whether the commission lawfully and reasonably permitted CEI to treat its investment in the four cancelled nuclear generating stations as amortizable costs." Id. at 825. "There is no question but that the overwhelming weight of authority from other jurisdictions supports the position of the commission." Id. at 826. However, that court disallowed amortization, based on its interpretation of the Ohio statute relating to service-related costs that a utility may recover from its rate payers.

investment, or an increase in its operating return. . . ." 73B C.J.S. Public Utilities, § 36 p. 234.

Unified systems of accounts prescribed by most regulatory agencies usually specify that considered as operating expenses, i.e., taxes advertising, salaries, commodity purchases and similar items. The PSC recognizes that it cannot ignore the necessary, fair and reasonable expenses of operation incurred by a utility in the rendition of service, and also that there are certain expenses which should be disallowed, such as the following:

"1. If the questioned outlays represent 'inefficiency' or 'improvidence', or

"2. Managerial discretion has been abused, or

"3. The action taken has been 'arbitrary' or 'inimical' to the public interest, or

"4. There has been 'economic waste', or

"5. Such outlays were not legitimate operating expenses because they were 'in excess of just and reasonable charges.' "[7]

In contending that the charges were "operating expenses", PP&L argues that a reasonable and prudent test should be allowed. We need not consider this test insofar as it applies to "operating expenses" since these charges were not "operating expenses" as that term is generally considered.

It is probable that PP & L would not contend these expenses to be "operating" ones if the projects were completed. PP & L would then own a percentage of property; and it would expect to have the cost of the project included in the amount attributed to its "used and useful" property in establishing a rate base.

The argument in this case results from the situation in which PP & L suffers financial loss due to failure of a project

[7] Brief of the Staff of the Wyoming Public Service Commission, before the Public Service Commission of the State of Wyoming, quoting from 1 A. Priest, Principles of Public Utility Regulation, p. 51 (1969).

intended to become "used and useful" in the service of the public. PP & L wants to include the loss in its financial picture whereby an increase in rates will eventually pay for the loss, i.e., the loss will be borne by the consumers. PP & L believes this proper inasmuch as service rendered by an electric power utility is limited by the availability of the supply of the product it furnishes. The same can be said of some other utilities. A prudent and reasonable attempt to secure or preserve such supply could well be considered a service rendered on behalf of the consumers.[8] When the life of a utility is limited by such supply, amortization of an entire plant investment has been allowed. *Pennsylvania Power & Light Company v. Pennsylvania Public Utility Commission,* 10 Pa.Cmwlth. 328, 11 A.2d 151 (1973); *Clarksburg Light & Heat Co. v. Public Service Commission,* 84 W.Va. 638, 100 S.E. 551 (1919); *East Ohio Gas Co. v. Public Utilities Commission,* 137 Ohio St. 225, 28 N.E.2d 599 1940). PP & L contends that successful effort in this endeavor would redound to the benefit of the consumers by furnishing a more abundant and cheaper supply of the product and, thus, the failure of the effort should be at the expense of the consumers.

On the other hand, PSC considers the failure of the projects as one of the risks incurred by PP & L when it entered into them. PSC would have the stockholders of PP & L bear the loss since the decision to embark upon the project was made by their representatives who had an opportunity to calculate the risk and to be governed by such calculation. If PP & L gauged the risk with the intention that the loss would be borne by the consumers, there would be no risk at all for PP & L (the stockholders). This fact might encourage PP & L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail and of great gain should the small chance of success occur.

If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are

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[8] It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to insure future supplies.

to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility.

In *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming*, Wyo., 627 P.2d 173, 179 (1981), we said:

> "As pointed out in *Public Service Commission for the State of New York v. Federal Power Commission*, D.C. Cir. 1972, 467 F.2d 361, the primary mission of a regulatory body is to protect the consumer, it must 'strive to reach a balance between consumer, producer, and those whose interests fall in between.' The fixing of just and reasonable rates by the PSC involves a balancing of investor and consumer interests, but a fair return to investors is not necessarily fair to consumers. *Petition of New England Tel. & Tel. Co.*, supra [115 Vt. 494] 66 A.2d [135] at 147."

PSC is not in a position to take on any aspect of utility management. It must restrict its position to "regulation" with management decisions being entirely that of the utility. The difficulty surfaces when it is necessary to distinguish between "regulation" and "management".

Regulation by means of setting rates and determining the factors controlling such by necessity prescribes the "management" domain. Section 37-2-121, W.S.1977, empowers the commission to act when it determines a rate to be "inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential" and it may "fix . . . such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act." PSC has authority to "prescribe and order" changed "any service or service regulation" as it shall determine "to be unjustly discriminatory or unduly preferential", or "any service or facility" found to be inadequate or unsafe," or "any facility or service regulation" found "to be unjust or unreasonable." Section 37-2-122(b), W.S.1977.

"Regulation" also can be said to limit "management" aspects in connection with certain debt acquisitions by utilities.

> "The right of every gas corporation and of every electrical corporation operating as a public utility in the state of Wyoming to issue, assume or guarantee securities and to create liens on its property situated within the state of Wyoming is a special privilege, hereby subjected to the supervision and control of the public service commission of the state of Wyoming, as hereinafter in this act [§§ 37-6-101 to 37-6-107] set forth. Such public utility when authorized by order of the commission and not otherwsie, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen (18) months after the date thereof, for the following purposes: for the acquisition of property; for the construction, completion, extension or improvement of its facilities; for the improvement or maintenance of its service; for the discharge or lawful refunding of its obligation; for the reimbursement of monies actually expended for said purposes from income or from other monies in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five (5) years next prior to the filing of an application with the commission for the required authorization; or for any other purpose approved by the commission." Section 37-6-101, W.S.1977.

Section 37-6-102, W.S.1977, provides that such securities may be issued only after application therefor is filed with the PSC and after a hearing from which the Commission does not find that such

> "transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act [§§ 37-6-101 to 37-6-107]; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility."

And § 37-6-106, W.S.1977, provides that such securities shall be void if "issued, assumed or guaranteed without application to or approval of the commission."

Section 37-3-111, W.S.1977, provides in part that:

> "Every public utility shall file with the commission copies of contracts, agreements or arrangements to which it may be a party, as the commission may designate. . . ."

Section 218 of PSC Rules (1979) requires the filing with it of a copy of all "special contracts which govern the sale by the utility of public utility service or the purchase by the utility of a utility commodity for resale."

It is recognized that the foregoing statutes and rule do not require PSC approval for PP & L's part ownership of the terminated projects. The reference to the statutes and rule is only to exemplify the "management" control by PSC in utility operation. It is a necessary adjunct to "regulation".

Black's Law Dictionary (5th Ed. 1979) defines "regulate" as:

> "To fix, establish, or control; to adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws."
>
> ". . . Regulation is an exercise of control while management is an exercise of conduct, in carrying on business. . . ."
>
> *Cloutier v. State Milk Control Board,* 92 N.H. 199, 28 A.2d 554, 558 (1942).
>
> ". . . 'The word "regulate" is one of broad import. . . .'" *Blumenthal v. City of Cheyenne,* 64 Wyo. 75, 186 P.2d 556, 566 (1947), quoting from *City of Ownersboro v. Cumberland Telephone & Telegraph Co.,* 230 U.S. 58, 33 S.Ct. 988, 992, 57 L.Ed. 1389 (1913).
>
> ". . .'The power . . . to "regulate" . . . implies the right to prescribe and enforce all such proper . . . rules and regulations as may be deemed necessary and wholesome in

conducting such business in a proper and orderly manner. *Ogden City v. Leo,* 54 Utah 556, 182 P. 530, 5 A.L.R. 960.' " *Jensen v. Town of Afton,* 59 Wyo. 500, 143 P.2d 190, 201 (1943).

"... prohibit[ing] an incident to or a particular method in connection with business.... is merely regulation. ... regulation necessarily implies restriction in some respects and that that means nothing more or less than a partial prohibition. ... *Steffey v. City of Casper,* Wyo., 357 P.2d 456, 461 (1960).

The PSC is vitally concerned with fixing of rates. If an effort to obtain a new source of energy supply will affect rates—potentially lowering them if successful and potentially raising them if not successful, PSC has the power to control the effect such project will have on rates. This does not mean that it has the power to dictate whether or not the project should be undertaken or to concern itself with other aspects of the conduct relative to the project. The utility need not consult PSC before embarking on the project. However, if the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval is necessary.

In briefs and arguments, the parties make reference to other instances in which PSC has authorized inclusion in the rate base of costs of wells for gas which could turn into dry holes, costs for early retirement of obsolete (for environmental reasons) mechanical flue gas stacks, costs for an abandoned hydro project as a result of federal legislation, etc. Usually the activity which subsequently failed was approved as an activity prior to its inception by the PSC or it consisted of property with a used and useful history.

Although we cannot attribute a consideration by PSC in determining just and reasonable rates of an investment of questionable return in a potential product producing project to (1) the used and useful property or business of the utility, or (2) to an operating expense of it, we do recognize the authority of the PSC to consider such as a part of the "other values of the

. . . system, business . . . of the public utility," § 37-2-122(a), W.S.1977 (see fn. 5), if the consideration, and only if the consideration is given before the investment is made or agreed to be made.[9] The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted—or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success or failure is known. As noted, this consideration and resulting decision will affect a "management" aspect within "regulation," but it is a type of regulation necessary and proper for the exercise of the power and duties of the PSC.

In this instance, the PSC was not consulted prior to the investment about it. It was not necessary to do so. But when the investment failed, the onus of the failure must rest on PP & L, the only one which considered the risk and, therefore, the only one accepting it.

Affirmed as to PP & L and dismissed as moot as to the other appellants. LV's rate applications are to be processed without consideration of its involvement in the projects.

ROSE, Justice, specially concurring.

I concur with the result reached by the majority but do not join in that portion of the opinion which would allow the consumers to bear all costs associated with canceled construction projects so long as the Public Service Commission (PSC) had approved the projects prior to investment by the utility. As I interpret Wyoming's statutory scheme pertaining to the regulation of public utilities, the PSC is without authority to accept or veto *proposed* construction projects for the purpose of

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[9] PP & L's project had a book value as part of its system or business when the investment was made. After it failed, it had no value at all.

shifting their cost to ratepayers. Furthermore, even if the PSC possessed such authority, the ratemaking principles embodies in our statutes do not permit the recovery of costs associated with construction projects which are terminated before ever providing service to utility customers.

I

This court has consistently held that the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any reasonable doubt as to the existence of any power must be resolved against its exercise. *Public Service Commission v. Formal Complaint of WWZ Company,* Wyo., 641 P.2d 183 (1982); *Phillips Petroleum Company v. Public Service Commission,* Wyo., 545 P.2d 1167 (1976); *Tri-County Electric Association, Inc. v. City of Gillette,* Wyo., 525 P.2d 3 (1974).

The general powers of the PSC are set out in § 37-2-112, W.S.1977:

> "The commission shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act."

This statute, as the majority recognize, empowers the PSC to regulate and supervise utilities, not to manage[10] them. Regulation and supervision, however, necessarily entail control over the *effects* of decisions made by those who manage public utilities.

The position advocated by the majority would extend the PSC's sphere of control to cover not only the effects of managerial decisions but the decision-making process itself. In support of their position, the majority cite and discuss a number of provisions in our regulatory scheme as illustrative of the degree of control that the PSC exerts over management as a necessary adjunct to regulation. These statutes, in my judg-

[10] The American Heritage Dictionary defines "manage" to mean: "To direct or administer (the affairs of an organization, estate, household, or business)."

ment, emphasize the supervisory or watchdog function of the PSC in protecting the public interest. Section 37-2-122, W.S.1977, authorizes the PSC to eliminate existing services, facilities, and regulations which are inadequate, unsafe, unjust, or unreasonable. Section 37-6-101, W.S.1977, empowers the PSC to supervise the issuance of securities and the creation of liens, activities which are regulated in competitive as well as monopolistic enterprises in order to protect the public investor. Section 37-6-102, W.S.1977, *mandates* PSC approval of proposed securities transactions unless such transactions are inconsistent with the public interest, unlawful, or exceed the assets of the utility. Finally, § 37-3-111, W.S.1977 and PSC Rule 218 require public utilities to file designated contracts in order to keep the PSC informed.

Clearly, these statutes authorize the PSC, in obeying its charge to guard the public interest, to monitor the business decisions previously made by utility executives. Using these statutes as a foothold, however, the majority make what I consider to be a monumentally faulty and frighteningly unjustified logic-leap to the conclusion that the PSC has the authority to rule on the viability of proposed utility projects with respect to whether consumers will bear the risk of failure. To deny that such authority would encompass the power to dictate whether a particular project should be undertaken is to deny reality. Utility executives would be compelled to consult the PSC and obtain approval before embarking on any project, or face possible stockholder suits for mismanagement in the event the project fails. The PSC would, in effect, be making crucial decisions concerning utility proposals—all in the name of regulation and, with all due respect to our Public Service Commission and its able membership, the PSC is not required to be qualified and probably is not qualified to make such delicate and technical public utility decisions.

The function of the PSC is to protect the consumer through the regulation of public utilities, while taking into consideration the legitimate interests of the utilities. *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming,* Wyo., 627 P.2d 173 (1981). In carrying out this function, the

PSC is empowered to control the effect that new energy projects will have on rates—but only after the utility management has assessed the merits and drawbacks of the proposal and reached a final decision based on sound business judgment, and only after the project has become used and useful in providing energy. It is not the function of the PSC to provide an insurance policy under which the ratepayers will protect the investments of utility stockholders against all risks. This court recognized as much in *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming,* supra, 627 P.2d at 179, where we described the regulatory function of the PSC and said:

> ". . . The public interest is to be given paramount consideration; desires of a utility are secondary. *Big Horn Rural Electric Co. v. Pacific Power & Light Co.,* Wyo. 1964, 397 P.2d 455. The purpose of the PSC's authority is to protect the public from utilities affected with a public interest."

Not only is the participation by a state agency in a utility's business decisions unnecessary to regulation, it is impermissible. The United States Supreme Court in *State of Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri,* 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, 985 (1923), said:

> ". . . It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company,* 291 Ill. 209, 234 [125 N.E. 891].
>
> " '*The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation . . .*' " (Emphasis added.)

The proper relationship between regulators and regulated enterprises was described by 1 Priest, Principles of Public Utility Regulation, p. 23:

> "Where inefficiency or improvidence or economic waste or abuse of discretion or action inimical to the public interest have been demonstrated, the agency having jurisdiction may intervene. Business decisions are, however, the prerogative of management. Regulators are not the masters of public utility enterprises. They may, and often should, breathe down the executive's neck, but the basic responsibility is his, not theirs."

The majority opinion would permit utility companies to recover their investments in terminated construction projects, ineligible for inclusion in rate base or operation expenses, if the approval is first submitted to the PSC for approval. I conclude that the exercise of such power by the PSC would exceed the scope of the enabling statutes and implicate constitutional proscriptions concerning private property.

II

The majority conclude, and I agree, that Pacific Power & Light Company's capital investment in the now terminated nuclear plants cannot properly be included in the rate base as used and useful property or be amortized as an operating expense. However, the majority would permit the PSC, in determining just and reasonable rates, to consider the costs associated with such investments under the "other values" language of § 37-2-122(a), W.S.1977. That statute provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

Under this statute, the decisive question is whether "an investment of questionable return in a potential product producing project" (majority opinion 677 P.2d at 808) is one of the "other values of the plant, system, business and properties of

the public utility," which may properly be considered for ratemaking purposes. I conclude that it is not, because to allow the PSC to consider the value of a contruction project which ultimately fails is to circumvent the used and useful principle of § 37-2-119, W.S.1977.[11] I would interpret the physical and other—presumably non-physical—values specified in § 37-2-122(a), supra as encompassing only the values of those items properly includable in the rate base. That is, § 37-2-122(a) empowers the PSC to consider for ratemaking purposes only the property and business of the public utility which is used and useful in producing the product. I cannot attribute to the legislature the intent to embody in the ratemaking formula both the used and useful principle and the means to annihilate that principle.[12]

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[11] Section 37-2-119, W.S.1977, provides as follows:

"In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value, the operating statistics for any public utility both as to revenues and expenses and as to the physical features of operation in such detail as the commission may deem advisable; the earnings, investment and expenditures of any such corporation as a whole within this state, and as to rates in local exchanges or plants of any telephone, telegraph, water, electrical or gas corporations, the geographical location thereof shall be considered as well as the population of the municipality in which such plant or exchange is located."

[12] *See Office of Consumers' Counsel v. Public Utilities Commission,* 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), where the Ohio Supreme Court refused to interpret a catchall statute so as to permit the commission to consider the utility's investment in four terminated nuclear power plants as amortizable costs. The court said:

". . . The commission views [the pertinent statute] as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly, first because the provisions are linked inextricably with the ratemaking factors contained in [the statute specifying permissible considerations in ratesetting proceedings], and secondly because the General Assembly undoubtedly did not intend to build into its recently revised (1976) ratemaking formula a means by which the commission may effortlessly abrogate that very formula." 423 N.E.2d at 828.

The majority cite several instances in which the PSC has considered for ratemaking purposes the costs of projects not currently useful in supplying the product. Such consideration was permissible, according to the majority, since the terminated activity had received the price approval of the PSC or had a used and useful history. I would have held that our statutory scheme, including the used and useful principle, contemplates the consideration of the costs attributable to the cited projects, without expanding the meaning of the "other values" language of § 37-2122(a) and notwithstanding a lack of price approval by the PSC.

Pursuant to § 37-2-122(a), supra, obsolescence of previously useful equipment is a proper factor to be considered in setting just and reasonable rates. The cost of drilling a dry gas well is properly categorized as an operating expense, since gas, unlike electricity, is a commodity for which the utility must search in order to provide service. The search for gas necessarily includes the drilling of a certain percentage of dry holes, whereas the production of electricity does not necessarily include the building of a certain percentage of defunct plants. I agree with the pronouncement of the Ohio Supreme Court in *East Ohio Gas Co. v. Public Utilities Commission,* 137 Ohio St. 225, 28 N.E.2d 599, 609 (1940), concerning the propriety of considering the cost of gas leaseholds which turn out to be unproductive.

> "It must be apparent that the cost of acquiring, holding for a time during which delay rentals must be paid, testing and finally cancelling unproductive acres is the only method by which productive gas acres can be found and developed, and it is equally apparent that this expense must be borne by the consumer who ultimately uses the gas from the productive acres."

It is not necessary to expand our existing statutory scheme in order to justify the recovery of these types of costs through rates.

I conclude that the statutory formula for setting just and reasonable rates does not permit the consideration of utility

investments which are not attributable to the rate base and which are not properly designated as costs of operation. I would adopt the position reiterated by the Ohio Supreme Court when faced with a question of statutory interpretation under circumstances similar to the instant case:

> " . . . ' . . . . It is only proper that their [the investors] venture be found operational before they commence to recoup their capital outlays from the consumers' . . ." *Office of Consumers' Counsel v. Public Utilities Commission,* 67 Ohio St. 2d 153, 423 N.E.2d 820, 829 (1981), quoting from *Office of Consumers' Counsel v. Public Utilities Commission,* 58 Ohio St. 2d 449, 456-457, 391 N.E.2d 311 (1979).

THOMAS, Justice, dissenting.

I must dissent in part from the decision reached by the majority of the court in this case. I am in accord that the case must be dismissed as to Lower Valley Power & Light, Inc., Chemical Bank and Washington Public Power Supply System because it is moot. With respect to Pacific Power & Light Company, however, I would hold that the Public Service Commission had no authority to enter the order which it entered, and I would remand the case with directions that it be dismissed.

The remarkable thing in connection with the disposition of this case by this court is that the majority opinion and the concurring opinion refer to and discuss the correct legal propositions, but they apply them in an erroneous manner. In Justice Rose's special concurring opinion he very ably articulates the proposition that the Public Service Commission has only that power and authority granted to it by the Wyoming Constitution and statutes, and that the statutory powers must be strictly construed. There is no need to again cite the authorities which encompass those holdings. At page 808 of the majority slip opinion the court aptly says:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP & L's part ownership of the terminated projects."

The document which initiated Pacific Power & Light Company's involvement in this proceeding was a notice and order setting hearing which was entered on April 22, 1982, and that document did not reflect the justification for the investigation by the Public Service Commission. It is clear, however, that the commission did proceed pursuant to § 37-2-117, W.S. 1977, which provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility *should be made in order to secure compliance with the provisions of this act and orders of the commission,* it may of its own motion summarily investigate the same." (Emphasis added.)

While I might rely simply upon the concession in the majority opinion to the effect that no investigation was needed to secure compliance with the provisions of the act or the orders of the commission, I will point out that this record and the arguments of counsel for the commission are devoid of any reference to any statute or order of the commission with which compliance by Pacific Power & Light Company needed it be secured. I am prepared to concede that the commission might investigate in order to determine if such a situation existed, but once it determined that there was no justification for the investigation I cannot perceive any authority which would permit the Public Service Commission to enter the order that it did in this instance.

I recognize that it is popular to ride on the judicial steam roller which has flattened Washington Public Power Supply System. While I might be in sympathy with the result which the Public Service Commission and this court reaches, I find I have no empathy for what I believe to be an abuse of the commission's authority which this court has sustained.

I understand that the Public Service Commission has told Pacific Power & Light Company that if Pacific Power & Light Company should wish to include its investment costs in these abandoned nuclear power plants in any future rate to be

applied to Wyoming consumers that the Public Service Commission of Wyoming will not permit that. Purely and simply that is an advisory order from the Public Service Commission, and our statutory scheme does not justify such an approach. This court has said that it does not render advisory opinions, and we dismiss cases in which an advisory opinion is sought. *Aetna Casualty and Surety Company v. Langdon,* Wyo., 624 P.2d 240 (1981); *Kwallek v. State,* Wyo., 596 P.2d 318 (1976); *Police Protective Association of Casper v. City of Casper,* Wyo., 575 P.2d 1146 (1978); *State v. Rosachi,* Wyo., 549 P.2d 318 (1976); *Knudson v. Hilzer,* Wyo., 551 P.2d 680 (1976); and *Tobin v. Pursel,* Wyo., 539 P.2d 361 (1975). In part the fact that this court does eschew advisory opinions is premised upon the proposition that there is no way in which the judgment which is rendered may be carried into effect. Perhaps the result is to make the case moot as discussed on page 802 of the majority slip opinion. The point, however, is that the Public Service Commission, without statutory authority, does not have any business entering an order such as this; and yet, by affirming what the Public Service Commission has done, this court has, in effect, and contrary to a longstanding jurisprudential discipline, joined in an advisory opinion. No matter how much the parties want an answer to this question we should not so casually abandon that rule of jurisprudence.

As indicated, I would reverse the order of the Public Service Commission because this court has the duty to hold unlawful and set aside agency action which is in excess of statutory authority. Section 16-3-114(c)(ii), W.S. 1977 (Oct. 1982 Rev.).

APPENDIX I

105 Idaho 432, 670 P. 2d 839

Gary ASSON and LeRae Asson, husband and wife, citizens of the City of Burley; Ransom H. Brown and Betty Brown, husband and wife, citizens of the City of Heyburn; and J.R. Simplot Company,

Petitioners,

v.

CITY OF BURLEY; Charles Shadduck, Mayor of the City of Burley; James Parker, J. Garth Payne, Frances McDonald, Dale Doman, Walter Petersen, and Truman Bradley, as members of the City Council of Burley; City of Heyburn, Harold R. Hurst, Mayor of the City of Heyburn; and Wilford Wilcox, Dean Baker, David Mayes, and Larry McComb, as members of the City Council of Heyburn,

Respondents.

Richard H. BOHLE and Paula L. Bohle, husband and wife; Blaine Jensen and Lillian D. Jensen, husband and wife; Charles B. Park and Billie F. Park, husband and wife; Clarence F. Bellem and Lillian B. Bellem, husband and wife; Magic Valley Foods, Inc., an Idaho corporation; Cameron Sales, Inc., an Idaho corporation,

Petitioners,

v.

CITY OF RUPERT, William F. Whittom, Mayor of the City of Rupert, Clark Cameron, Dwinelle E. Allred, June Dombeck and Ronald E. Klebe, as members of the City Council of Rupert.

Respondents.

Nos. 14719, 14809
Supreme Court of Idaho.
Sept. 26, 1983.
Rehearing Denied Nov. 4, 1983.

Alternative writ of prohibition made permanent.

Bakes, J. filed a dissenting opinion.

Craig Meadows and Phillip M. Barber of Boise, for petitioners Asson, et al.

Roger D. Ling of Rupert for petitioners Bohle, et al.

William Parsons of Burley for respondent City of Burley. Stephen A. Tuft of Burley for respondent City of Heyburn.

Donald J. Chisholm of Burley for respondent City of Rupert.

A. L. Smith of Idaho Falls for intervenor City of Idaho Falls.

Peter B. Wilson of Bonners Ferry for intervenor City of Bonners Ferry.

R. B. Kading, Jr., and R. M. Turnbow, of Boise, for intervenor Washington Public Power Supply System.

Howard Humphrey, and Stanley Welsh, of Boise, for intervenor Chemical Bank.

HUNTLEY, Justice.

In 1976, five Idaho cities[1] (parties to this action) entered into an agreement with the Washington Public Power Supply System (WPPSS) for future supplies of electrical energy to be generated by two planned nuclear power plants. Although the plant projects were later terminated, under the terms of the agreement the cities were nevertheless required to continue to pay their percentage shares of the bond obligations incurred, amounting to millions of dollars. Residents and purchasers of electricity of three of the five cities brought this petition for a writ of prohibition, pursuant to this Court's authority under Idaho Const. Art. 5 § 9 and I.C. §§ 7-401, 402, to prevent the respondent cities from raising municipal electric rates to cover their payment obligations. The petitioners allege the cities acted without constitutional authority when entering into the 1976 agreements.

The record shows that each of the five Idaho cities owns and operates an electrical distribution system that carries electricity within the city and to nearby areas.[2] However, only two of the cities have generating facilities (Idaho Falls and Bonners Ferry), and those facilities do not supply all of their power needs. Thus, each of the five cities relies on outside electrical power supplies. Since 1963 (and before, for several cities) the outside supplier has been the federal government, through its agency the Bonneville Power Administration (BPA). The BPA provides the Pacific Northwest region with comparatively inexpensive hydroelectric power generated at facilities along the Columbia River system.

In the late 1950's and early 1960's Pacific Northwest cities were receiving forecasts of greatly increased future energy demands. It was expected that the Northwest's hydroelectric resources would soon be inadequate to meet the needs of the region's power users. During this period, and through the late 1960's and into the 1970's, cooperative efforts were made by electricity purchasers such as municipalities and utility districts to predict the region's future energy needs and to make plans to meet them. Organizations such as the Public Power Council

[1] Burley, Rupert, Heyburn, Idaho Falls and Bonners Ferry (the latter two are in the suit as intervenors).

[2] The essential facts were submitted by stipulation of all parties.

and the Pacific Northwest Utilities Conference Committee involved utilities in the region in energy forecasting and planning activities.[3] Another organization, the Joint Power Planning Council, including BPA and many of its power customers, made a study of future energy requirements and concluded that new electrical generating plants would have to be built to keep pace with increasing power demands. A plan was developed which called for the construction of several thermal power plants.

In January 1971 and 1973, and September 1973, the five Idaho cities, together with other Pacific Northwest utilities, entered into agreements with WPPSS to purchase electrical "project capability" from three nuclear power plants to be constructed by WPPSS.[4] Financing for the three nuclear plants was arranged under a plan called "net billing." The cities were to purchase shares of project capability from WPPSS, payment for which was to be made out of city utility revenues. The cities would then assign their project capability to BPA, which would reimburse the cities by reducing their wholesale power bills in amounts equal to their payments to WPPSS. In this way, BPA would actually fund the WPPSS projects.[5]

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[3] The Pacific Northwest Utilities Conference Committee was comprised of 130 public and private utilities in the region. Each year it published the "West Group Forecast," a compilation of forecasts of "load growth" from each of the utilities in the region. Those forecasts supported predictions of power shortages by the 1980's.

[4] WPPSS is a municipal corporation and joint operating agency authorized under Washington state laws to finance, construct, own and operate electrical generating facilities. It was established in 1957 and is composed of 19 public utility districts and four Washington cities. "Project capability" which the utilities contracted to purchase from WPPSS is a percentage share of the potential output of nuclear plants to be constructed. In the agreement it is defined as follows:

> "the amounts of electric power and energy, *if any,* which the projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part of any reason whatsoever), less Project station uses and losses." (Emphasis added.)

[5] The participants would pay debt service on the bonds through their monthly payments to WPPSS, and BPA would, in effect, reimburse the participants.

Each city entered into the agreement with respect to these first three plants (referred to as Projects 1, 2, and 3) after passage by its city council of a resolution authorizing execution of the agreement. Each city also represented, in the form of an opinion letter from its counsel, that it had authority to enter into the agreements.[6] The cities had specified statutory authorization, by means of a provision enacted in 1971, to participate in a net-billing arrangement and purchase electrical power to be resold to BPA:

> **"I.C. § 50-342. Electric Power—Purchase or disposal.**—In addition to the power otherwise conferred on cities of this state, a city owning and operating an electric distribution system shall have the authority to purchase electric power and energy for the purpose of disposing of such power and energy to the United States of America, department of the interior, acting by and through the Bonneville power administrator, through exchange, net billing or any arrangement which is used for supplying the needs of the city for electric power or energy, and such authority shall not be subject to the requirements, limitations, or procedures contained in sections 50-325 and 50-327, Idaho Code." [7]

The net-billing financing plan made it possible for BPA to assist in insuring future supplies for its electricity customers. Each participating utility pays WPPSS its share of the costs of developing the projects, and BPA gives the participant a credit in the amount of such payment on the BPA bill for power purchased by the participant.

In December 1973 the Public Power Council investigated the possibility of two additional power plants to be designed, financed and built by WPPSS. For various reasons (one of which was a 1973 Treasury Department ruling denying tax exempt status for bonds to finance additional thermal plants from which BPA would receive more than 25% of the energy

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[6] Each city received a form opinion letter from WPPSS which it was required to follow in stating its authorization, as a prerequisite to entering into the agreement.

[7] J.C. §§ 50-325 and 50-327, would have prevented sale of electrical power to BPA by the cities unless it was excess power. J.C. § 50-342 removed that limitation. The section was amended in 1981 and 1982.

output), the two newest plants (Projects 4 and 5) could not be financed under the same arrangements as Projects 1, 2 and 3, which had BPA involvement. During 1974 and the first half of 1975, the Public Power Council, BPA, WPPSS and various utilities discussed possible financing plans for Projects 4 and 5.

Although three nuclear plants were already being built, many Northwest utilities were still convinced that the future would bring energy demands well beyond the output of existing and planned power plants. BPA customers were made aware of a possible "notice of insufficiency" in 1973 and thereafter. The "notice of insufficiency" was an official statement by BPA to its preference customers that it would not be able to supply them with sufficient electricity by the early 1980's. BPA informed its customers that unless a plan were created to provide for future power production it would be forced to issue its notice of insufficiency.[8]

The proposed additional nuclear plants were to be located at the same sites as Projects 1 and 3 to reduce costs. Costs were projected to be low in comparison to other alternative power facilities. Impelled by the region's forecasts of energy shortages and the apparent advantageous circumstances of pairing two new plants with projects already under construction, the cities entered into a second set of agreements with WPPSS in July 1976.

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[8] The notice of insufficiency was finally issued in June, 1976. BPA's letter to the cities stated, in part:

> "Bonneville has completed an analysis of the resources it estimates will be available for disposition and its requirements and commitments to supply firm energy in the year July 1, 1983, to June 30, 1984. As a result of this analysis, Bonneville has determined that the firm energy resources available to it will be insufficient in that year to supply in full the City's firm energy requirements, the firm energy requirements of other preference customers, and Bonneville's obligations to deliver firm energy to its other customers.
>
> Therefore, in accordance with the provisions of the Power Sales Contract, I hereby give notice, effective at 2400 hours on June 30, 1976, that in the year beginning July 1, 1983, and in each year thereafter during the term of the Power Sales Contract, Bonneville's obligation to supply firm energy to the City will be limited to an allocation, the amount of which will be computed according to the terms of Section 22 of the General Contract Provisions."

The agreements, in summary form, provided that WPPSS would use its best efforts to arrange financing for the two plants, to obtain regulatory permits, to issue and sell bonds, and to complete planning and engineering studies, arrange for construction and timely completion of the plants, and thereafter maintain the plants. Project 4 was to be completed in March 1982, and Project 5 in April 1984. If WPPSS failed to secure financing, or if the plants were not complete as planned, the participating cities were nevertheless bound to pay their obligations. The agreement provided:

> "The Participant shall make the payments to be made to Supply System [WPPSS] under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon performance or nonperformance by Supply System or by any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other [sic] legal or equitable remedy." [9]

The payment obligation of each city was based on its percentage share of the project capability purchased. The city pays its percentage of the projects' annual budget and fuel costs, including all of WPPSS' cost of ownership, debt service on bonds, and all other costs. The cities' obligation to pay was to begin on the earliest of three dates: (1) continuous operation of any plant; (2) July 1, 1988; or (3) one year after termination of any project.

Projects 4 and 5 were terminated in January 1982 when WPPSS was unable to secure sufficient financing to complete the plants. At the time, Project 4 was approximately 20% complete and Project 5 was approximately 16% complete.[10]

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[9] Section 6(d), p. 19 of the agreement, referred to as the "hell or high water clause."

[10] The WPPSS Board of Directors and Executive Board terminated the projects by adoption of Resolutions no. 1203 and no. 34,

(footnote continues)

Bonds had been issued by WPPSS in the amount of $2.25 billion.[11]

Under the agreement, the cities' payment obligations are limited to revenues derived from the operation of their utility systems. Each participant agrees to establish, maintain and collect electrical charges adequate to cover its payment obligations. In the event a participant defaults, provision is made for the non-defaulting participants to assume payment of the defaulter's obligation, up to a maximum of 25% of their own obligations.

As they had done with Projects 1, 2 and 3, the cities submitted opinion letters stating they were authorized by law to enter into the Project 4 and 5 agreements. Although the two sets of agreements were essentially the same (both involved the purchase of project capability, under the same terms, and both contained the so-called "dry-hole liability" provision), the financing arrangements were different in one important aspect—involvement of BPA. In the Project 4 and 5 agreements, the cities are ultimately liable for the "dry-hole" risk, whereas in the earlier agreements the cities incur no expense for which they do not obtain electrical power in like amount from BPA. In that sense, the Project 1, 2 and 3 agreements were similar to power purchase contracts. The cities received electricity in proportion to their payments to WPPSS.

Petitioners allege the cities acted in violation of the Idaho Constitution, Art. 8, §§ 3 and 4, and Art. 12, § 4, when they entered into the Project 4 and 5 agreements. Since our analysis of the applicability of Art. 8, § 3 is dispositive of the case, we need not address the other constitutional provisions. Art. 8, § 3 states:

> **"Limitations on county and municipal indebtedness**—*No* county, *city,* board of education, or school district, or other subdivision of the state, *shall incur any*

(footnote continued)

giving as the reason WPPSS' inability to proceed due to financing conditions beyond its control.

[11] Each city's share of the principal amount of the bonds sold is as follows: Burley, $4.275 million; Rupert $7.290 million; Heyburn, $5.782 million; Idaho Falls, $20.587 million; Bonners Ferry, $4.275 million.

indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further than any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this

> state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district." (Emphasis added.)

Since it is admitted that no election was held by any of the five cities to obtain approval of the electorate prior to entering into the agreements in question, petitioners contend the cities contracted indebtedness in violation of the Idaho Constitution, and their indebtedness or liability is therefore void. Respondent City of Heyburn and intervenors WPPSS and Chemical Bank[12] argue, however, that Art. 8, § 3 does not apply to the financing arrangement in this case because that provision contemplates an indebtedness for which taxes would need to be assessed, and the cities' payment obligations here are to be satisfied out of utility revenues alone.

Such an interpretation, however, would ignore the plain language of the constitutional provision, which states that "[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof. . . ." While it is true that the provision goes on to add another requirement, relating to the collection of an annual tax to pay interest on the debt and a sinking fund to pay the principal, the latter requirement is simply sound fiscal policy and does not relate to the primary constitutional mandate of electorate approval of substantial and far-reaching municipal indebtedness. A financing plan which provides for amortization of the indebtedness by some means other than assessment of taxes might be held to satisfy that part of Art. 8, § 3 which calls

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[12] Chemical Bank, a New York corporation, is trustee for the holders of bonds issued by WPPSS to finance construction of Projects 4 and 5.

for an assessment, but it cannot fulfill the requirement of voter approval.

City of Heyburn, WPPSS and Chemical Bank also contend that Art. 8, § 3 would be inapplicable under the rule distinguishing municipal indebtedness from "special fund" indebtedness.

It is urged that we overrule *Feil v. City of Coeur d'Alene,* 23 Idaho 32, 129 P. 643 (1912), and apply the "special fund" doctrine in this case. That doctrine, accepted by a great majority of cases,[13] holds that a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed. *Feil* dealt with a decision by the city of Coeur d'Alene to purchase a municipal water system, to be financed by bonds which would be repaid out of a fund containing only the revenues derived from operation of the water works. It was argued that since no indebtedness was contracted by the city itself—but rather only by the bond fund—the expenditure did not come under Idaho Const. Art. 8, § 3. The *Feil* court rejected that argument, reasoning that Idaho's expansive constitutional provision (which, unlike several other states' examined by the court, contained the word "liability" as well as "debt") included an indebtedness paid out of a fund separate from the city's general fund. The court was critical of "subtleties and refinements of reasoning" utilized to suggest that no liability is incurred where a special fund is involved. 23 Idaho at 49, 129 P. at 649. Since *Feil,* a series of cases have declined to apply the special fund doctrine. *See, Boise Development Co. v. Boise City,* 26 Idaho 347, 143 P. 531 (1914); *Miller v. City of Buhl,* 48 Idaho 668, 284 P. 843 (1930); *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931); *Straughn v. City of Coeur d'Alene,* 53 Idaho 494, 24 P.2d 321 (1932); *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956).

However, *Feil* and its quite extensive succession of authority no longer prevent application of the special fund exception

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[13] For a list of other jurisdictions applying the special fund doctrine, see Moore, Constitutional Debt Limitations on Local Governments in Idaho—Article 8, Section 3, Idaho Constitution. 17 Idaho L. Rev. 55, 65 n. 50 (1980).

because that exception has been made a part of Idaho law by way of amendments to Art. 8, § 3. *See, Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976).[14] The first such amendment, passed in 1950, authorized cities to purchase or construct water and sewage systems, treatment plants, and off-street parking facilities to be financed by bonds, "the principal and interest of which to be paid solely from revenue derived from rates and charges for the use, and the services rendered by, such systems, plants and facilities . . ." Subsequent amendments have increased the scope of the special fund exception to include port districts (1964), public recreation facilities (1966), air navigation facilities (1968), and rehabilitation of existing electrical generating facilities (1976). We note that, with the exception of port districts, indebtedness of a city for any of the purposes listed, even though not subject to the tax assessment provision of Art. 8, § 3, is nevertheless specifically conditioned on voter approval. The intent of the framers of the constitutional amendments, and the electorate through their ratification, is clear that approval of a municipality's qualified voters is necessary whether its Art. 8, § 3 indebtedness or liability is against the general fund of the city, and its tax revenues, or limited to a special fund of project-generated revenues.

It might be argued that since Art. 8, § 3 provides for "rehabilitation of existing electrical generating facilities" and makes no mention of construction of new facilities or indirect financing of new facilities through purchase of project capability, the latter purposes are not covered by the requirements of that section. However, it seems unreasonable to believe that the framers and ratifiers of the amendments intended for a city to obtain assent from a majority of its qualified voters to rehabilitate or repair its electrical plant and yet not obtain voter approval of the financing of completely new generating facilities, at perhaps several times the cost.

The better view is that the constitutional provision requires a city to obtain only a simple "majority" voter approval where

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[14] The court stated, "furthermore any doubt as to the precedential value of the *Feil* opinion has been removed by subsequent amendments by the people of this state to Art. VIII, § 3, which now authorizes a municipality to do what was impermissible at the time the case was decided," citing to *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953). 97 Idaho at 558, 548 P.2d at 58.

the indebtedness undertaken is only for the rehabilitation of existing facilities (a purpose more similar to the "ordinary and necessary expenses" exception), whereas if the indebtedness is for the construction of wholly new facilities (obviously a much more extensive undertaking), then the "two thirds (⅔)" majority approval within the general application of the article would apply. This interpretation is substantiated by the 1972 amendment which divided the special fund exceptions into two groups: those requiring two-thirds voter approval and those requiring only a simple majority.[15] When the provision covering the rehabilitation of existing electrical generating facilities was added in 1976, it was placed within the second group.

Reasoning *a fortiori*, we cannot conceive of an interpretation of Art. 8, § 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.[16] Art. 8, § 3, if it has application to a city's issue of bonds to finance rehabilitation of its electrical generating facilities, surely applies to a city's guaranty of bonds issued to construct two new nuclear power plants.

Thus, were we to accept the argument that the cities' liability comes under the special fund doctrine, the indebtedness would still be without constitutional authority because Art. 8, § 3, requires voter approval of qualifying indebtedness regardless of the method or source of repayment. However, we do not believe the special fund exception is applicable here. The special fund doctrine is normally applied

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[15] H.J.R. No. 73, 1972 Idaho Sess. Laws p. 1251.

[16] The amortized monthly cost of each city's share of the $2.25 billion bond obligation, over 30 years, is:

Burley, $29,752.00 per month,
Rupert, $50,735.00 per month,
Heyburn, $40,244.00 per month,
Idaho Falls, $143,279.00 per month,
Bonners Ferry, $29,752.00 per month.

Simple mathematics reveals overall indebtedness ranging from a low of $10,710,720.00 for Burley and Bonners Ferry, to a high of $51,580,440.00 for Idaho Falls. It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a $10.7 million debt for a city of 1,906 people (Bonners Ferry, 1980 census).

in situations where the city's indebtedness is for the purpose of building or buying revenue-producing property, and only the revenue produced from that particular property is used to repay the indebtedness. For example, a city might issue bonds to fund construction of a power generating station, the bonds being repayable from income generated by the power station. Such financial undertakings might be said to "pay for themselves," leaving no possibility of obligation on the city's general fund (requiring replacement by additional taxation). In the present case, the cities' obligation to pay off the WPPSS bonds has created no revenue-producing property. The cities receive no electrical power for their monthly payments to WPPSS, and must raise their rate charges on power they already purchased to create a fund out of which to pay WPPSS. In essence, they must impose a surcharge on their rate-paying residents and other electrical power users, for which they provide no additional service.[17] Indeed, far from qualifying as a special fund exception, this indebtedness might constitute a general obligation on the city for which it has nothing to show.[18]

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[17] To the extent this surcharge imposes an obligation on the rate-payer unrelated to the quantity of electricity used, it could constitute a tax. Supposing the extremely unlikely situation of there being only one rate-payer in the municipality, or of the whole group of rate-payers passing a month without using any electricity, under the terms of its agreement with WPPSS, the city would be compelled to charge a "rate" sufficient to make its monthly payment to WPPSS no matter how unreasonable it would be as to the single rate-payer, or in spite of the fact that no service was provided. The supposition may be fanciful, but it serves to illustrate the nature of the revenues collected by the city; they are not properly "utility revenues." *See,* 12 McQuillin, *Municipal Corporations* § 35.38 (1970).

[18] In light of the contractual requirment that non-defaulting participants assume the burden of paying a defaulting participant's share (up to 25% of their individual shares), there arises the question of a defaulting municipality's liability to its fellow participants, which may elect to sue it. They would not be bound as WPPSS is to recovery only against the special fund, the agreement providing:

> "If the Participant shall fail or refuse to pay any amounts due to Supply System hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and the Participants assuming such obligation, either individually or as a member of a group, shall have a right to recovery from the Participant. Supply System or any Participant as their interests

(footnote continues)

We now address the contention of WPPSS, Chemical Bank, and the City of Heyburn that the cities' indebtedness is excepted from the requirements of Idaho Const. Art. 8, § 3 by virtue of its being an "ordinary and necessary" expense. That proviso reads as follows: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . ." In our interpretation of this language, we are benefitted by a rather extensive history of case law. We note at the outset that this proviso consists of two requirements: (1) that the expense be ordinary and necessary, and (2) that it be authorized by the general laws of the state. *City of Pocatello v. Peterson* 93 Idaho 774, 777, 473 P.2d 644, 647 (1970). We will address the "ordinary and necessary" requirement first.

Early cases interpreted the "ordinary and necessary" language very narrowly. The court often looked to the amount of the expense in proportion to the city or county's revenue for that year. In *County of Ada v. Bulien Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896), the court stated.

> "If it is claimed that this expenditure comes within the proviso of section 3, article 8, of the constitution, we answer that a construction of that proviso, as well as of the entire section, was given by this court in *Bannock Co. v. Bunting*, 4 Idaho, 156, 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly $40,000, where the revenue of the county for the year was only about $70,000, would not readily be classed as an 'ordinary and necessary expense.' It would be difficult, we apprehend, to name an expense under such a construction that would not be 'ordinary and necessary.' If a necessity

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(footnote continued)

> may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against Participants, which obligations shall include reasonable attorneys' fees in all trial and appellate courts." Section 17(e), pp. 48-9.

If other participants, either individually or as a group, bring an action against a defaulting municipality, a judgment obtained in the action would be assessed against the city (as opposed to its utility service, or revenues therefrom) as the contracting entity, and recoverable from the city's general fund.

> existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have." *Id* at 90, 47 P. at 823.[19]

See also, Ball v. Bannock Co., Idaho 602, 51 P. 454 (1897). Expenditures held *not* to be ordinary and necessary include: the construction of bridges, *Bullen Bridge, Dunbar, supra;* construction of a wagon road, *McNutt v. Lembi Co.,* 12 Idaho 63, 84 P. 1054 (1906); purchase of a water system, *Woodward v. City of Grangeville,* 13 Idaho 652, 92 P. 840 (1907); construction of a schoolhouse addition, *Petrie v. Common School Dist.,* 44 Idaho 92, 255 P. 318 (1927); purchase of a street sprinkler, *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931). Expenditures held to be within the ordinary and necessary exception include: salaries of city officers and employees, *Butler v. Lewiston,* 11 Idaho 393, 83 P. 234 (1905); repair of city waterworks, *Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912); construction of a jail in a newly created county, *Jones v. Power Co.,* 27 Idaho 656, 150 P. 35 (1915); maintenance of streets, *Thomas v. Glindeman,* 33 Idaho 394, 195 P. 92 (1921); cost of employing school teachers, *Corum v. Common School Dist.,* 55 Idaho 725, 47 P.2d 889 (1935).

Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be; *new* contruction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities. Thus, the court could hold that the city of Grangeville was not authorized, except by compliance with the requirements of Art. 8, § 3, to purchase an existing water system from the estate of a

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[19] In the *Bunting* case, the court held that the purchase of a site for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county . . . . It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of $4,000, they might purchase one at a cost of $10,000, and proceed to erect a courthouse at a cost of $20,000, all of which would be in direct violation of the constitution." *See, Dunbar v. Board of Commrs.,* 5 Idaho 407, 49 P. 409 (1897). The *Bunting* court looked less to the nature of the expense than to the amount.

deceased city resident in the *Woodward* case, *supra,*[20] but could hold that the city of Nampa was authorized (without voter approval) to repair and restore its present water system after it was badly damaged in an attempt to put out a downtown fire in the *Hickey* case, *supra.* Similarly, the city of Moscow's decision to *improve* its existing waterworks system and build a water storage tank, to provide a "more adequate water supply" was within the application of Art. 8, § 3 of the Constitution. *Durand v. Cline,* 63 Idaho 304, 119 P.2d 891 (1941). *See also, Miller v. City of Buhl,* 48 Idaho 668, 284 P. 843 (1930), (purchase of electric generating system, to be paid for from receipts from sale of power and light, held to be required to comply with Art. 8, § 3); *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956), (entering into agreement with natural gas distribution system to provide gas for city residents and vicinity held to be covered by requirements of Art. 8, § 3, Idaho Const.); *Straughan v. City of Coeur d'Alene,* 53 Idaho 494, 24 P.2d 421 (1932), (purchase by city of municipal lighting plant, and of waterworks system, held to be within application of Art. 8, § 3); *Reynolds Construction Co. v. County of Twin Falls,* 92 Idaho 61, 487 P.2d 14 (1968), (construction of courthouse annex covered by Art. 8, § 3).

While it is true that recent cases dealing with application of Idaho Const. Art. 8, § 3, have interpreted the "ordinary and necessary" language more broadly,[21] they are not inconsistent with earlier case authority. In *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968), the court held that establishment of a "policeman's retirement fund" was within the ordinary and necessary proviso, reasoning that it was merely an extension of the city's salary compensation and support of its municipal law enforcement staff. Early cases were clear in ruling that salaries of municipal employees and related expenses are ordinary and necessary. *See, Corum v. Common School Dist., supra; Butler v. Lewiston, supra.*

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[20] "It will thus be seen that the ordinary and necessary expenses of said municipality may be contracted for by said city without any vote of the people, but where an expense is proposed to be incurred which exceeds the income and revenue provided for any year, such as the construction or purchase of a water system, or a part of such system, the same cannot be done without the assent of two-thirds of the qualified electors of said city." 13 Idaho at 660, 92 P. at 842.

[21] *See,* Moore, *Constitutional Debt Limitation, supra.*

In *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970), the court held that while repair and renovation of a municipal airport were not "inherently 'ordinary and necessary expenses' " the particular facts of that case brought them within the constitutional category. In its opinion the court stressed the upkeep and maintenance aspect of the city's expenditure. The court notes that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., *id.* at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense. *See, Butler v. City of Lewiston, supra.*

The question is whether the cities' belief that there would be inadequate power supplies several years in the future is sufficiently analogous to the cases which hold that repair or reconditioning of existing facilities is an ordinary and necessary expense. It is argued that the expenditure was certainly necessary in light of BPA's notice of insufficient power supplies by 1983. Although hindsight tells us the cities were mistaken (there has turned out to be more than adequate electrical power from the same facilities existing in the early to mid 1970's), there is no way the cities could have known otherwise from existing information. However, we need not decide whether the expenditure was "necessary" within the meaning of Art. 8, § 3, for we hold that it was not "ordinary." "Ordinary" means "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances." *Peterson, supra,* 93 Idaho at 778, 473 P.2d at 648. It would be difficult to apply these adjectives to the WPPSS agreement. It was a colossal undertaking, fraught with financial risk. It was open-ended; the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness—yet no ownership,

and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

We turn now to the second requirement of the constitutional provision: that the expenditure be authorized by the general laws of the state. While an Idaho municipality is authorized to "acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city", I.C. § 50-325, and may purchase for resale to BPA "electric power and energy" under a net-billing agreement, I.C. § 50-342, we can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity. Thus, we hold that the agreement entered into by the Idaho cities and WPPSS does not come with the ordinary and necessary proviso of Art. 8, § 3 of the Idaho Constitution, and that section consequently having application in this case, the agreement is void as to the cities, who were acting *ultra vires* by obligating their residents without an election and compliance with the constitution.

We note that we have had at issue before us only the agreement relating to Projects 4 and 5. The cities' authorization to enter into Project 1, 2 and 3 agreements is not at issue, and as we have pointed out, the two sets of agreements are sufficiently different to make much of our holding not applicable even by analogy to the earlier agreements, which we perceive to be in the nature of power purchase contracts more than long-term debt obligations. Since we hold that the cities' agreements as to Projects 4 and 5 are void, it follows that the alternative writ of prohibition in these consolidated cases is hereby made permanent.

DONALDSON, C.J., SHEPARD and BISTLINE, JJ., concur.

BAKES, J., dissenting:

I cannot join in the majority opinion. If viewed at the time of inception, instead of with hindsight, the contracts under analysis here should withstand any constitutional attack the petitioners could muster. It is only because, through hindsight, the majority can see what a "bad deal" the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case. Clearly, the contracts under consideration comply with any constitutional requirement. Analysis under Art. 8, § 3, reveals that (1) the obligation under the agreements is not the type of obligations contemplated under Art. 8, § 3; and (2) that even if the above reason fails, the agreements should still be upheld under the "ordinary and necessary" exception to the requirement of a citizens' election. Analysis under Art. 8, § 4, and Art. 12, § 4, leads to the same conclusion. Those sections do not invalidate these agreements because (1) the agency with whom the cities contracted is a public agency, and those sections merely prohibit contracts with private entities; and (2) there can be no lending of the credit of a public entity if the general fund of that entity is not liable on the obligation. Because these agreements withstand scrutiny under all of these constitutional provisions, the agreements should be upheld.

This is not to say that the cities are liable on these contracts. Our only concern in this case is the constitutionality of the cities' actions in entering into these contracts. This opinion would not preclude the cities from asserting any defenses to formation of these contracts that they might bring in another forum. In fact, it appears from the record that these cities have been discharged by a Washington trial court because of the action of the Washington Supreme Court in invalidating the contracts as to the Washington defendants. We should not bend our own Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses.

I

A

The obligation "incurred" by the cities under these agreements is not the type of "indebtedness or liability" contemplated by Art. 8, § 3. That section contemplates the type of liability or indebtedness that will be repaid by the collection of an annual tax. Thus, the section provides some protection for the taxpayers who will be required to pay such annual tax. It requires cities to go to those taxpayers and obtain their assent to the liability or indebtedness incurred by submitting the matter to an election. However, under these agreements, no tax will ever by required. The liability in question is not payable from the general funds of the city. By the terms of the contract itself, it is payable only from revenues obtained from the sale by the cities of electric power. The sole source of revenue from which the cities are obligated to make payment to WPPSS is the electric utility rates charged only to customers of the electric utilities operated by the cities, most but not all of whom are located within the cities. No tax funds are ever involved under this contract. Because this obligation can never be a liability on the general city fund, it is not the type of liability contemplated under Art. 8, § 3; thus, Art. 8, § 3, should not render the agreement void.

B

Another reason exists that should validate the Participants' Agreements under Art. 8, § 3. That section provides for an exception to the requirement of a citizens' election where the liabilities are "ordinary and necessary expenses authorized by the general laws of the state." The agreements were contracts for the acquisition of electricity. These participant cities were lawfully in the business of providing electricity to their residents and surrounding areas, and faced with a future shortage of electricity, the entering into of these agreements to provide a future source of electricity was an "ordinary and necessary" function of a city's business of providing such electrical power.

This Court has recognized that the "ordinary and necessary" exception shall be applied on a case by case basis. The

cases considered by this Court have defined "ordinary and necessary" in various ways.

> " 'Ordinary' means 'regular; usual; normal; common; often recurring . . . .' . . . 'Necessary' means "indispensable." . . . An expenditure, although not of a frequently recurring nature, may nonetheless be 'ordinary and necessary' " *City of Pocatello v. Peterson,* 93 Idaho 774, 778, 473 P.2d 644, 648 (1970).

This Court later defined "ordinary and necessary" as follows:

> "An expense is ordinary if *in the ordinary course of the transaction of municipal business,* or the maintenance of municipal property, *it may be and is likely to become necessary."* (Emphasis added.) *Thomas v. Glindeman,* 33 Idaho 394, 195 P. 92 (1921).

In *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970), we considered the question of whether a contract for the expansion of an airport facility was a contract for "ordinary and necessary" expenses within the exception to Art. 8, § 3. This Court considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was authorized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The Court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to Art. 8, § 3. In its conclusion, the Court noted the following:

> "Furthermore the repair and improvement of the Pocatello airport facility is essential for the proper growth and development of the area. This is especially so since the railroads, upon which public travel and communications were heavily dependent in yesteryear, are discontinuing passenger service to many cities." 93 Idaho at 779, 473 P.2d 644.

The factors noted in *City of Pocatello* in finding those expenses to be ordinary and necessary are also applicable in the contextual framework involved here. The cities here are authorized by law to operate electrical power plants and

purchase electrical power for distribution to residents of the city. *See* I.C. §§ 50-325 and -342. All of these cities are in the business of distributing electrical power to their residents. Their residents are thus dependent upon these cities for their supply of electrical power. The source of power previously used by the cities was in effect becoming "obsolete," in that the BPA, from whom the cities had previously purchased their electrical power, had notified them that it would no longer be able to meet their electrical power needs by the early 1980's. The cities therefore were required to seek alternative sources of electrical power in order to continue service to their residents. All of these factors considered together indicate that this case is substantially similar to the question considered in *City of Pocatello v. Peterson, supra.* The liability incurred by the city was thus an ordinary and necessary expense, and the agreements do not violate Art. 8, § 3, of the Idaho Constitution and should not be struck down.

II

A

The majority opinion does not discuss Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, but the agreements also withstand scrutiny under those sections. Those provisions read:

> "**[Art. 8] § 4. County, etc., not to loan or give its credit**—*No* county, *city,* town, township, board of education, or school district, or other subdivision, *shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual association or corporation, for any amount or for any purpose whatever,* or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." (Emphasis added.)
>
> "**[Art. 12] § 4. Municipal corporations not to loan credit**—*No* county, town, *city* or other municipal corporation, by vote of its citizens or otherwise, *shall ever* become a stockholder in any joint stock company, corporation or association whatever, or *raise money for or make donation or loan its credit to, or in aid of, any such company*

> *or association:* provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom its proportion to the whole amount so invested." (Emphasis added.)

Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, are both sections intended to limit the power of municipal corporations to lend or pledge their credit to outside entities. Art. 12, § 4, prohibits the lending of credit, but makes a specific exception for indebtedness for "school, water, sanitary and *illuminating purposes.*" Art. 8, § 4, "goes further and is more restrictive" than Art. 12, § 4, *Village of Movie Springs* v. *Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960). It absolutely prohibits the lending or pledging of credit directly or indirectly for any purpose whatever.

These two constitutional provisions have been interpreted in numerous Idaho cases. This Court has interpreted these provisions as prohibitions upon the lending of credit in aid of "private" associations or corporations. *See Board of County Comm'rs v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975); *Village of Moyie Springs v. Aurora Mfg. Co., supra; School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917). As we stated in *Boise Redevelopment Agency v. Yick Kong,* 94 Idaho 876, 499 P.2d 575 (1972):

> "The purpose of such a prohibition is clear. Favored status should not be given any private enterprise or individual in the application of public funds. The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution. We are led to the firm conviction that only private interests were intended to

> fall within the strictures of those sections relating to 'association,' 'corporation' and 'joint stock company.' " *id.* at 883-84.

In *Yick Kong* we were considering the constitutionality of the creation of a redevelopment agency intended to rehabilitate the downtown area of the City of Boise. We held that the redevelopment agency, being a public and not a private enterprise, did not fall within the strictures of Art. 8, § 4, and Art. 12, § 4. We recently reaffirmed *Yick Kong* in *Idaho Falls Consolidated Hospitals v. Bingham County Board,* 102 Idaho 838, 642 P.2d 553 (1982). There we said:

> "A review of the proceedings at the constitutional convention, the history of the west, and a similar statute that was in effect at the time the constitution was adopted, show that the delegates only sought to prevent private interests from gaining advantage at the expense of the taxpayer." 102 Idaho at 842, 642 P.2d 553.

In the present case WPPSS is not a private entity. Rather, it is a public corporation established by nineteen public utility districts in the State of Washington and the cities of Seattle, Tacoma, Richland and Ellensburg, and incorporated under the laws of the State of Washington. Thus, the evil sought to be avoided in Art. 8, § 4, and Art. 12, § 4, the lending of public credit to private enterprise, is not present here. Significantly, even if an incidental benefit to a profit-making enterprise is present, that in itself will not invalidate a program that has a public purpose. "Only if private interests are primarily benefited, must such programs with public goals be invalidated." *Board of County Comm'rs v. Idaho Health Facilities Authority, supra.* Here, although the argument may be made that certain private entities are benefited by the participation of the cities in the WPPSS agreement, the primary benefit of the agreements inures to the public users of electrical power. Thus, in the present case, and under these facts, there is no violation of Art. 8, § 4, or Art. 12, § 4.

A final reason for upholding these contracts lies in the arguments already presented. Art. 8, § 4, and Art. 12, § 4, both require a lending or pledging of the credit of the municipality. There can be no lending or pledging of that credit if the general fund itself is not liable on the obligation. As shown before, this

obligation is payable only out of revenue from the utilities operated by the cities; thus, no general fund is liable. This is not the type of situation envisioned in these two articles of our Constitution.

Thus, under any analysis of these agreements and our Constitution, they should withstand scrutiny and should be enforced.

APPENDIX J

Section 10, clause 1, of Article I of the United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX K

Affiliates and Subsidiaries (Except Wholly-Owned Subsidiaries) of Chemical Bank

MCL and Co., Ltd.
Arrendadora Del Atlantico S.A.
Compania Arrendamento De Financiera, Arfin S.A.
Far East Chemco Leasing & Financing Corp.
P.T. Chemco Graha Sejahtera Leasing
Noroeste Chemical, S.A.
C.B. Insurance Services Ltd.
Chemical Bank Hong Kong Nominees, Ltd.
Apartmentos Boulvard, S.A.
Banco General De Negocias, S.A.
Banco Noroeste De Investimento
Banque Internationale Du Congo
Empresa Minera De Mantos Blancos, SA
Far East Bank and Trust Co.
Industrialization Fund of Finland, Ltd.
Inversiones Sudamerica, SA
Leyland Italia Finanziaria, SpA
Nalin Ind. Sendirian Berhad
Northwest Iron Co. Ltd., Delaware, U.S.A.
Private Export Funding Corp., U.S.A.
Private Investment Co. for Asia
Phoenix Travel (Strand) Limited
P.T. Multinational Finance Corp.
Saehan Merchant Banking Corp.
Sanluis Financial and Investment Co., Ltd.
Sifida
Sociedad Anonima Escuela Campo Alegre
Sociedad Financiera Exterior, CA
ChemCredit Sendirian Berhad
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.
Albuquerque Capital Management, Inc.

Alexander, Scriver and Associates, Inc.
BaCh Holding Corporation
Brown & Company Securities Corporation
Chemgraphics Systems, Inc.
Chemical Business Credit Corp.
Chemical Equity Incorporated
Chemical Venture Capital Corporation
Chemical First State Corporation
Chemical Bank (Delaware)
ChemExec ReloSystems, Inc.
Chemical Connecticut Corporation
Chemical Denver, Inc.
Chemical Philadelphia Corp.
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical New York Corporation
Chemical Trust Company of Florida, N.A.
Chemical Investment Advisers, Inc.
Chemical Mortgage Company
Blendon Woods Corp.
Chemical Appraisal Associates, Inc.
Chemical Realty Capital, Inc.
Javelin Properties, Inc.
Chemical New Jersey Corporation
Chemical New York Corporation—USA
Chemical New York, Inc.
Chemical New York N.V.
Chemical New York Southwest, Inc.
Chemical Real Holdings, Inc.
Chemical Realty Corporation
Dommerich Factors, Inc.
Favia, Hill & Associates, Inc.
Investment and Capital Management Corp.
Investment and Capital Management of the South, Inc.
Pronto, Inc.
Pronto Link Corporation
Pronto U.S.A., Inc.
B/L U.S.A., Inc.
Electronic Customer Services, Inc.

Sunamerica Corporation
Chemical Financial Services Corporation
Chemical Financial Services Corporation of Colorado
SFC Agency Inc.
Sunamerica Corporation
Sun Financial Corporation
Sun America Finance, K.K. (Japan)
Sunamerica Financial Corporation
Sunamerica Financial Services, Inc.
Fort Collins Sunamerica Industrial Bank
Greeley Sunamerica Industrial Bank
Denver Sunamerica Industrial Bank
Springs Sunamerica Industrial Bank
Park Sunamerica Industrial Bank
The Portfolio Group, Inc.
Van Deventer and Hoch, Inc.
Chemical Bank International—North America
Chemco International Inc.
Chemical International Finance, Ltd.
Chemco International Leasing Inc.
ChemLease Worldwide, Inc.
Chem Network Processing Services, Inc.
Chem Credit, Inc.
Chemical Bank of Canada
Chemco Canada Leasing, Inc.
Chemical Bank Trustee Co. Ltd.
Chemical Bank (Middle East) SAL
Bank of New Providence, Ltd.
Chemical Bank/Howard de Walden
Chemical Sanwa Merchant Bank, Ltd.
ChemBank Nominees Limited
Chemical Bank Insurance Services, Ltd.
Chemical Asia Limited
Chemical Bank Nominees, Ltd. (Hong Kong)
Chemical Bank (Guernsey) Ltd.
Chemical Bank Pension Plan Trustee Ltd.
Chemical Bank International Ltd.
Chem Bank International Nominees, Ltd.
Chem Bank International Leasing, Ltd.
Chemsecurities, Ltd.

Chem Bank International (Underwriters) Ltd.
Chem Bank International Investment Holding Co.
Chemical Bank (France) S.A.
Chemical Bank Trustee Co., Ltd.
Chemical International Finance and Consulting S.A./N.V.
Chemical Holdings, Ltd.
Chemical All States Ltd.
CB Beteilgungs Und Verwaltungsgesellschaft m.b.h.
Chemical Bank Computer Services g.m.b.h.
Chemical Bank A.G.
Chemco Leasing g.m.b.h.
Unterstuetzungsgesellschaft m.b.h. der Chemical Bank
Chemical Bank (Suisse) S.A.
Chemtime, Ltd.
Chemco Cayman Ltd.
Chemco Finance (Hong Kong) Limited
Chemco Leasing Japan Inc.
Shin Aoyama Enterprise
Chemco Finance Singapore Limited
Chemco International Limited
Witan Enterprises, Inc.
Woodmere Enterprises, Inc.
Chemco Leasing S.A.
Chemco Leasing B.V.
Chemco Leasing Belgium S.A./N.V.
Chemco Leasing Iberico, S.A.
Chemco Leasing (Thailand) Ltd.
Chemco Leasing und Finanz A.G.
Chemco Location S.A.
Chemco Commercio E Servicos Ltda.
Libmar One Inc.
Libmar Two Inc.
Libmar Three Inc.
Libmar Four Inc.
Libmar Six Inc.
Marlib Alpha Inc.
Marber One Ltd.
Marber Two Ltd.
Marpan One, Inc.
Marpan Two, Inc.